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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Regional Director of the Twelfth Region of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-18a) is reported at 515 F.2d 1185. The opin-

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ion and order of the district court (App. C, *infra*, pp. 23a-41a) are reported at 86 LRRM 2976.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975, and the Regional Director's timely petition for rehearing and rehearing *en banc* was denied on October 17, 1975 (App. B, *infra*, pp. 19a-22a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court has authority under Section 10(j) of the National Labor Relations Act to issue an interim bargaining order, despite the absence of a preexisting bargaining relationship between the parties, when it has found reasonable cause to believe that the employer has committed a number of serious unfair labor practices tending to destroy the union's majority status and to preclude the holding of a fair election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (the Act), as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in App. F, *infra*, pp. 136a-138a.

STATEMENT

On May 6, 1974, pursuant to charges filed by Truck Drivers, Local Union No. 512 ("the Union"),

affiliated with the International Brotherhood of Teamsters, the General Counsel of the National Labor Relations Board, through its Regional Director, issued a complaint against Pilot Freight Carriers, Inc. ("Pilot Freight") and BBR of Florida, Inc. ("BBR"). The complaint alleged that both companies had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by, *inter alia*, interfering with their employees' rights freely to select a bargaining representative, discriminatorily discharging employees because of the employees' organizational activities, and refusing to recognize and bargain with the union selected by a majority of their employees (A. 2-4).[1]

On May 13, 1974, the Regional Director, on behalf of the Board, filed with the United States District Court for the Middle District of Florida a petition for interim injunctive relief pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j). The petition sought a prohibition against further violations of Sections 8(a)(1), (3) and (5) of the Act and an order requiring Pilot Freight and BBR to offer to reinstate two employees allegedly discharged because of their union activities and to bargain with the Union pending final adjudication by the Board of the unfair labor practice charges in the complaint (A. 2-18). The evidence introduced at the hearing in the district

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[1] "A." refers to the appendix to the briefs in the court of appeals.

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court on the Regional Director's petition for interim injunctive relief may be summarized as follows.[2]

A. Background

Pilot Freight is a common carrier of general commodity freight operating in the Eastern United States. Since 1964, Pilot Freight has been a signatory to the National Master Freight Agreement ("NMFA"), a collective bargaining contract periodically negotiated by the International Brotherhood of Teamsters and a multi-employer bargaining association of which Pilot Freight is a member (App. C, *infra*, pp. 28a-29a).[3] All of Pilot Freight's 1800 employees, with the exception of those working at or out of Pilot Freight's four Florida terminals and one Virginia terminal, are represented by the Teamsters (*ibid.*). See *Boire* v. *Teamsters*, n.3, *supra*, 479 F.2d at 782.

In 1970, the Interstate Commerce Commission granted Pilot Freight authority to extend its routes into Florida. Shortly thereafter, Pilot Freight opened

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[2] A hearing on the petition for interim injunctive relief was held on May 16 and 17, 1974, at which the Board presented its witnesses and those witnesses were cross-examined. Because of time constraints imposed by the district court's calendar, however, respondents were not able to call witnesses at that time and the court gave them until May 31 to present their cases in documentary form. Pilot Freight subsequently filed affidavits and exhibits in opposition to the Board's petition (App. C, *infra*, p. 28a).

[3] This agreement covers over 450,000 workers employed by hundreds of companies in the freight industry. See *Boire* v. *Teamsters*, 479 F.2d 778, 782 (C.A. 5).

terminals in Jacksonville, Hollywood, Tampa and Orlando. But unlike its practice outside Florida, Pilot Freight did not directly employ its labor force at the new locations. Rather, the over-the-road and local pickup and delivery services needed at the Florida terminals were provided by vehicle owner-operators and the dockworkers were supplied by independent labor contractors (App. C, *infra*, p. 29a). BBR is one such contractor, furnishing approximately 90 dockworkers at Pilot Freight's Jacksonville terminal (*id.* at 34a-35a; A. 31, 213).

The Teamsters originally contended that Pilot Freight's Florida operations constituted an accretion to the bargaining unit governed by the NMFA. In 1972, the Teamsters filed charges under the grievance provisions of the NMFA, which resulted in an arbitration decision that the Florida operations constituted an accretion (App. C, *infra*, pp. 29a-30a). Pilot Freight, in turn, filed a unit clarification petition with the Board,[4] and also unfair labor charges with the Board's General Counsel.[5] On January 31, 1974,

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[4] Section 102.60(b) of the Board's Rules and Regulations, 29 C.F.R. 102.60(b), provides that "[a] petition for clarification of an existing bargaining unit or a petition for amendment of certification * * * may be filed by a labor organization or by an employer."

[5] The General Counsel subsequently issued an unfair labor practice complaint against the Teamsters, alleging that its attempts to gain recognition at the Florida terminals through enforcement of the accretion provisions of the NMFA violated Sections 8(b)(1)(A) and 8(b)(3) of the Act. On October 17, 1972, the district court enjoined the Teamsters, pursuant to a petition filed by the Board's Regional Director under Section 10(j) of the Act, from engaging in a variety

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the Board issued its decision, holding that the truckdrivers were employees of Pilot Freight, that the dockworkers were joint employees of Pilot Freight and the various dockwork contractors, and that Pilot Freight's Florida operations were not accretions to the existing unit but rather "each of the Florida terminals or the four terminals together may constitute an appropriate unit." *Pilot Freight Carriers, Inc.*, 208 NLRB 853, 858.[6]

B. The present organizational campaign

In February 1974, following the Board's unit clarification decision, the Union began an organizational drive among the truckdrivers and dockworkers at Pilot Freight's Jacksonville terminal. At the outset of the campaign, Harvey Lane, the president of BBR, warned an employee at the terminal that "you'll never see the day the Union will come in here," and added that Pilot Freight's president, Ruel Sharpe, "was prepared to spend ten million dollars, if necessary, to keep the Union out" (A. 37, 39). Thereafter, on February 7, Lane discharged the Union's principal employee organizers among the dockworkers at the Jacksonville terminal, Melvynn Johnston and Roy Brace (App. A, *infra*, pp. 6a-7a; A. 39-50, 52-53).

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of concerted activities in an effort to gain recognition at the Florida terminals under the accretion provisions of the NMFA. The court of appeals affirmed this decision. *Boire* v. *Teamsters*, 479 F. 2d 778 (C.A. 5).

[6] After the Board had issued its unit clarification decision, the Board's General Counsel and the Teamsters entered into a settlement agreement resolving the unfair labor practice complaint.

Executives of both BBR and Pilot Freight subsequently delivered a series of "captive audience" speeches to their employees on company premises (App. A, *infra*, p. 7a; A. 63-64, 68-69, 72-73, 122, 140-143, 154-155, 157, 181-182). The truckdrivers employed by Pilot Freight were told that despite the Board's unit clarification decision, they would continue to be treated by the company as independent businessmen. The truckdrivers also were threatened with financial loss if they chose to have the Union represent them, and certain new benefits were announced at the meetings with the promise that additional favorable changes would be made when the union question was taken care of (App. A, *infra*, pp. 7a-8a; A. 63-68, 70, 71-72, 72-73, 100-101, 102-103, 105-106, 107-108, 109, 114-116, 118-123, 138-143).

BBR President Lane directed a similar campaign at the dockworkers. Lane warned them that BBR would be forced out of business if he had to pay wages at the union scale and he claimed that money being spent to fight the Union would otherwise be going directly to them (App. A, *infra*, p. 7a; App. C, *infra*, pp. 36a-37a; A. 51, 55-56, 159). Lane also asserted that he could fire probationary employees who had signed union authorization cards, without any interference from the Labor Board (A. 61-62).

After the discharges of Johnston and Brace, the Union's principal solicitors of authorization cards, Pilot Freight instituted a "no solicitation—no distribution" rule. It barred the solicitation and distribu-

tion of authorization cards and campaign literature at the Jacksonville terminal and on other company property (App. A, *infra*, p. 7a; A. 56-57).

On February 13, 1974, after having obtained authorization cards from 81 of the approximately 127 drivers and dockworkers at the Jacksonville terminal, the Union informed Pilot Freight and BBR of its majority status and requested recognition (App. C, *infra*, p. 36a; A. 80-83). Pilot Freight asked to inspect the authorization cards, but then rejected the Union's tender of the cards and refused to recognize the Union or to bargain with it (App. C, *infra*, p. 36a; A. 33-34, 88-90).

The workers at the Jacksonville terminal struck on February 25, 1974, to protest their employers' actions. Thereafter, Pilot Freight officials solicited individual groups of employees to return to work, promising them additional benefits if they did so (App. C, *infra*, p. 37a; A. 73-77, 108, 110, 134-136, 143-147). Many employees accepted these offers, but the strike continued and spread to other Pilot Freight terminals on the East Coast (A. 76-77, 253).[7]

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[7] On August 15, 1974, Pilot Freight and the Union entered into a strike settlement agreement (App. D, *infra*, pp. 42a-45a), in which the Company agreed to accept a card check to resolve the question of recognition of a union representative for the truckdrivers at the Jacksonville terminal and to supplement the drivers' employment agreements with specified provisions of the NMFA if the Union prevailed in the card check. In return, the Union agreed to cease its strike against Pilot Freight. The dockworkers were not covered by the strike settlement agreement, but they also subsequently returned to work. See n. 10, *infra*.

In February, March and April 1974, the Union filed the unfair labor practice charges that form the basis of the present proceeding (App. C, *infra*, p. 33a).

C. The District Court's Conclusions and Order

The district court found reasonable cause to believe that the drivers and dockworkers at the Jacksonville terminal constitute an appropriate bargaining unit, that Pilot Freight and BBR are joint employers of the dockworkers at the terminal, and that a majority of all the drivers and dockworkers had designated the Union as their bargaining representative when the companies refused recognition (App. C, *infra*, pp. 35a-36a). The court further found reasonable cause to believe that Pilot Freight and BBR had committed a variety of unfair labor practices designed "to thwart and discourage membership in the Union and to interfere with, restrain and coerce their employees in the exercise of their section 7 rights * * *" (*id.* at 36a).

The court also found that if Pilot Freight and BBR continued the unlawful conduct with which they had been charged pending final adjudication of the unfair labor practice charges (App. C, *infra*, pp. 38a-39a; footnotes omitted):

> one of two possible results will obtain. If the Union resists these practices, as it has, the present strike against Pilot and BBR will continue indefinitely, resulting in great financial losses to the parties, as well as to the public as a whole. On the other hand, if the Union succumbs and

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> does not oppose the activities of Pilot and BBR, and if the Board later determines that Pilot and BBR have in fact committed unfair labor practices, then the Board may well be rendered impotent by the passage of time to remedy effectively the violations. That is, during the time required by the Board to ultimately decide these matters, Pilot and BBR would be able to obtain a work force devoid of union support so that, as a practical matter, a *Gissel*-type [*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575] bargaining order will be meaningless. This is exactly the sort of *fait accompli* that section 10(j) is designed to prevent. * * *

The court restrained Pilot Freight and BBR, pending final disposition of the matter by the Board, from threatening employees with reprisals because of their activities on behalf of the Union; granting wage increases or other benefits in order to discourage union activity; threatening employees with loss of employment unless they abandon the strike, and/or soliciting employees to abandon the strike; enforcing any rule discriminatorily prohibiting employee discussion of the Union and/or its activities; and laying off, discharging or discriminating in any manner in order to discourage union membership (App. C, *infra*. pp. 24a-25a).

The court denied the Regional Director's request for mandatory injunctive relief, however, holding that such an order "would go farther than the statute allows" (App. C, *infra*, p. 39a). While acknowledging that "as a practical matter, Pilot's and BBR's continued refusal to bargain with the Union pending

the outcome of the unfair labor practice proceeding may have the same result as their continuation of threats, promising and granting benefits, and other coercive activities" (*ibid.*), the court concluded that "a bargaining order in the form of a section 10(j) injunction would not preserve the status quo" but would instead "permanently change the relationship between the parties since the imposition of a duty to bargain in good faith implies the making of a valid collective bargaining agreement which would normally have a duration unrelated to the time the Board requires to conduct the underlying unfair labor practice proceeding" (*id.* at 40a-41a). The district court also denied that portion of the request for relief that sought the interim reinstatement of dock workers Johnston and Brace (*id.* at 41a).

D. The Court of Appeals' Decision

The court of appeals affirmed the district court's order. It agreed that "[t]he Board had reasonable cause to believe that Pilot and BBR were committing violations of [Sections] 8(a)(1), 8(a)(3) and 8(a)(5)" (App. A, *infra*, p. 11a)[8] and that only prohibitory relief was appropriate. So far as the request for a bargaining order was concerned, the court concluded (*id.* at 17a):

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[8] On December 23, 1974, an administrative law judge found that Pilot Freight and BBR had in fact engaged in substantial unfair labor practices (App. E, *infra*, pp. 46a-135a). The matter is presently pending before the Board on the companies' exceptions.

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> Here the signing of union cards precipitated the entire controversy; hence the *status quo ante* was that period prior to any union activity when the drivers and dockworkers were unrepresented. An interim bargaining order would materially alter that status, creating by judicial fiat a relationship that has never existed. * * *

The court added that since "an employer has no absolute duty to accept a card majority" where an uncertified union is seeking initial recognition, an interim bargaining order "would rest on the assumption that Pilot and BBR had actually committed unfair labor practices—an assumption we are unwilling to make, given that the union has not yet been forced to prove its case by a preponderance of the evidence" (*id* at 17a). The court of appeals also upheld the district court's refusal to order the interim reinstatement of Johnston and Brace because "the detrimental effects of [their] discharges have already taken their toll on the organizational drive" and "[i]t is questionable whether an order of reinstatement would be any more effective than a final Board order at this point" (*id.* at 14a).

The court of appeals subsequently denied the Board's petition for rehearing, stating that "[t]o the extent that our reasoning differs from the Second Circuit's rationale [in *Seeler* v. *Trading Port, Inc.*, 517 F.2d 33] we decline to follow it" (App. B, *infra*, p. 22a).

REASONS FOR GRANTING THE WRIT

1. As the court of appeals apparently recognized, its decision that under Section 10(j) of the National Labor Relations Act a district court has no authority to issue an interim bargaining order in the absence of a preexisting bargaining relationship between the parties conflicts with *Seeler* v. *Trading Port, Inc.*, 517 F.2d 33 (C.A. 2). In *Seeler*, as in the present case, the district court found reasonable cause to believe that an employer had committed a number of serious unfair labor practices in opposing a union's organization drive, and granted a temporary injunction against such practices pending completion of the Board's administrative proceedings. Although the union had obtained authorization cards from a majority of the employees, the district court declined to issue an interim bargaining order on the ground that it had no authority to do so under Section 10(j). The Court of Appeals for the Second Circuit reversed, holding that a district court has authority to grant such relief and remanding to the district court to determine whether the unfair labor practices "were in fact so serious as to warrant the issuance of an interim bargaining order" (517 F.2d at 40).

The court of appeals in *Seeler* held that "when the Regional Director makes a showing, based on authorization cards, that the union at one point had a clear majority and that the employer then engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible,

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the district court should issue a bargaining order under [Section] 10(j)" (*ibid.*). In that court's view, "[a] bargaining order [in such circumstances] becomes a just and proper means of restoring the pre-unfair labor practice status quo and preventing further frustration of the purposes of the Act" (*ibid.*). The court stated that "[o]nly if the district courts may issue interim bargaining orders can the union's viability be maintained to the degree necessary to make final Board adjudication in the form of an election or a bargaining order meaningful" (517 F.2d at 38).

In the present case the district court found that "as a practical matter" the employers' continued refusal to bargain with the union pending the outcome of the unfair labor practice proceeding "may have the same result as their continuation of threats, promising and granting benefits, and other coercive activities" (App. C, *infra*, p. 39a), which it found reasonable cause to believe the employers had engaged in. The court held, however, that it had no authority under the statute to grant an interim bargaining order. The court of appeals affirmed the district court's denial of an interim bargaining order, on the theory that "interim bargaining involves too large a step * * * to take by means of an injunctive vehicle designed to preserve issues for ultimate determination by the Board" (App. A, *infra*, p. 18a) and that such a bargaining order would not preserve the *status quo* but "would materially alter

that status, creating by judicial fiat a relationship that has never existed" (*id.* at 17a).

If the present case had arisen in the Second rather than in the Fifth Circuit, the court of appeals under its *Seeler* decision would have reversed the denial of an interim bargaining order instead of affirming it as the Fifth Circuit did. There thus exists a direct conflict between the two circuits over the authority of the district courts to grant such relief. Since, as we show below, the question is an important one in the administration of the National Labor Relations Act, this Court should resolve the conflict.[9]

2. In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, this Court recognized the Board's power to issue a bargaining order based on authorization cards where unfair labor practices committed by an employer "have the tendency to undermine majority strength and impede the election processes" (*id.* at 614). The Court agreed with the Board that merely prohibiting the recurrence of substantial unfair labor practices might not sufficiently ameliorate the deleterious effects of such conduct in undermining a union's strength and in de-

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[9] As Mr. Justice Harlan stated in granting a stay pending certiorari proceedings in *McLeod* v. *General Electric Co.*, the issue of "the standards governing the application of [Section] 10(j)—has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act" (87 S.Ct. 5, 6). Because the parties entered into a collective bargaining agreement prior to disposition of the petition for a writ of certiorari, this Court did not have occasion in *McLeod* to resolve the issue. See 385 U.S. 533.

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stroying the laboratory conditions essential to a fair election (*id.* at 611-614).

Similar considerations require the issuance of an interim bargaining order in the present situation. As the Second Circuit stated in *Seeler* v. *Trading Port, Inc., supra,* 517 F. 2d at 37-38:

> Just as a cease and desist order without more is ineffective as final relief in a *Gissel* situation, it is, in certain cases, also insufficient as interim relief. If an employer faced with a union demand for recognition based on a card majority may engage in an extensive campaign of serious and pervasive unfair labor practices, resulting in the union's losing an election, and is then merely enjoined from repeating those already successful violations until final Board action is taken, the Board's adjudicatory machinery may well be rendered totally ineffective. A final Board decision ordering a new election will leave the union disadvantaged by the same unfair labor practices which caused it to lose the first election. Even if the Board finally orders bargaining, probably close to two years after the union first demanded recognition, the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible. Only if the district courts may issue interim bargaining orders can the union's viability be maintained to the degree necessary to make final Board adjudication in the form of an election or a bargaining order meaningful.

Accord, *Smith* v. *Old Angus, Inc.*, 81 LRRM 2936, 2941 (D. Md.); contra, *Fuchs* v. *Steel-Fab, Inc.*, 356 F.Supp. 385 (D. Mass.); *Kaynard* v. *Lawrence Rigging, Inc.*, 80 LRRM 2600 (E.D. N.Y.).

Although no election was held here, the district court found that the unfair labor practices charged were such that "the Board may well be rendered impotent by the passage of time to remedy effectively the violations" App. C, *infra*, p. 38a). The reasoning employed in *Gissel* to support the issuance of a bargaining order where the employer's unfair labor practices require the setting aside of an election and preclude the holding of a fair substitute election is equally applicable to situations, such as that found likely to exist here, where the employer's unfair labor practices preclude the holding of a fair initial election. *National Labor Relations Board* v. *Gissel Packing Co., supra*, 395 U.S. at 580-582.

3. a. Section 10(j), and the companion Section 10 (*l*), were added to the Act by the Taft-Hartley amendments in recognition that the procedures of the Board were frequently too slow "adequately to protect the public welfare," and to achieve the statutory objective of "prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947); 1 Legislative History of the Labor Management Relations Act of 1947, pp. 407, 414 ("Leg. Hist."). The Senate Report explained (S. Rep. No. 105, *supra*, at 27; 1 Leg. Hist. 433):

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> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

Accordingly, Congress provided that "the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." S. Rep. No. 105, *supra*, at 8; 1 Leg. Hist. at 414.

The issues before a district court in a proceeding under Section 10(j) are whether there is reasonable cause to believe that the alleged unfair labor practices have been committed and whether the granting of the relief sought would be "just and proper." Under the broad public interest standards that govern injunctive relief in these situations (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331), "when the circum-

stances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, temporary relief may be granted under section 10(j)." *Angle* v. *Sacks*, 382 F. 2d 655, 660 (C.A. 10). In assessing the propriety of injunctive relief, the "district court should be able to conclude with reasonable probability from the circumstances * * * that the remedial purpose of the Act would be frustrated unless immediate action is taken." *Minnesota Mining and Mfg. Co.* v. *Meter*, 385 F. 2d 265, 270 (C.A. 8).

b. A final Board adjudication resulting in an election or a bargaining order is likely to be largely ineffective in the present type of case unless, pending such adjudication, the employer is not only enjoined from repeating its already completed violations but is required as well to bargain with the union and temporarily to reinstate employees alleged to have been discharged because of their union activities. Here the Union first demanded recognition from respondents, based on authorization cards signed by a majority of the workers at the Jacksonville terminal, on February 13, 1974 (App. C, *infra*, p. 36a). As the district court recognized, "as a practical matter, Pilot's and BBR's continued refusal to bargain with the Union pending the outcome of the unfair labor practice proceeding may have the same result as their continuation of threats, promising and granting benefits, and other coercive activities" (*id.* at 39a), which the court had enjoined. What the courts

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below failed to recognize was that this result was precisely what Congress empowered the Board to seek to avoid via a proceeding under Section 10(j)[10].

c. The court of appeals, while recognizing that "courts have not hesitated to issue interim bargaining orders where a pre-established bargaining relationship is being eroded by unfair labor practices," concluded in this case that "the considerations are very different when the union's representative status has not been certified" (App. A, *infra*, p. 16a). In the former case, according to the court, the bargaining order would merely preserve the *status quo*, whereas in the latter case it "would materially alter that status, creating by judicial fiat a relationship that has never existed" (*id.* at 17a).

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[10] The strike settlement agreement (see n. 7, *supra*) does not eliminate the need for the temporary bargaining and reinstatement orders sought by the Regional Director in this litigation. The agreement does not obligate, as would a bargaining order, both Pilot Freight and BBR to recognize the Union as the representative of a combined unit of drivers and dockworkers and immediately to commence negotiations for a contract covering that unit. Neither does the strike settlement agreement require Pilot Freight and BBR to offer to reinstate Melvynn Johnston and Roy Brace, the Union's principal employee organizers at the Jacksonville terminal. Absent such orders, the probability still exists that the level of union support among the dockworkers (who constitute a majority of the combined unit) will diminish to such an extent that the Union will be unable to function as an effective representative should the Board ultimately find a combined unit appropriate and require bargaining for that unit. See *Angle* v. *Sachs*, *supra*, 382 F. 2d at 661; accord *Reynolds* v. *Curley Printing Co.*, 247 F. Supp. 317, 323-324 (M.D. Tenn.).

But even if the authority of the Board under Section 10(j) is limited to maintaining the *status quo* at some time, "the status quo which deserves protection under § 10(j) is not the illegal status quo which has come into being as a result of the unfair labor practices being litigated," but rather "the status quo as it existed before the onset of unfair labor practices." *Seeler* v. *Trading Port, Inc., supra,* 517 F. 2d at 38. The Union here had acquired a valid card majority, which, but for the companies' unfair labor practices, could have served as the basis for establishing a bargaining relationship.

The court of appeals—noting that an employer, "absent surrounding unfair labor practices", "has no absolute duty to accept a card majority"—also concluded that "[w]ere we to order bargaining * * * our decision would rest on the assumption that Pilot and BBR had actually committed unfair labor practices—an assumption we are unwilling to make, given that the union has not yet been forced to prove its case by a preponderance of the evidence" (App. A, *infra,* p. 17a). But while a finding that Pilot and BBR "had actually committed unfair labor practices" may be necessary to sustain a *final* Board order requiring Pilot and BBR to bargain with the Union based on its card majority, a finding of reasonable cause to believe that such unfair labor practices have been committed is sufficient to support the interim orders sought by the Regional Director, requiring bargaining and the reinstatement of the Union's principal organizers pending the Board's final adjudication of the

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outstanding unfair labor practices charges. See *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 681-683.

As the district court noted (App. C, *infra*, p. 40a), an interim bargaining order would obligate Pilot Freight and BBR to begin bargaining in good faith with the Union and, if possible, to enter into a collective agreement covering all of the workers at the Jacksonville terminal. But any agreement reached by the companies and the Union could be made subject to termination should the Board ultimately decide that the companies were not obligated to bargain with the Union. Thus, neither an interim bargaining order, nor reinstatement of the Union's principal organizers at the Jacksonville terminal (which also could be undone if the Board should determine ultimately that they were lawfully discharged), would irreparably prejudice Pilot Freight or BBR.

If the Board ultimately sustains the unfair labor practice charges, however, the injury to the affected employees and the Union resulting from denial of the affirmative relief requested by the Regional Director may well prove to have been irreparable. In the latter event, the Union would not only have "lost several months of representational services it could have performed on behalf of the employees" (App. A, *infra*, p. 18a), but its "position in the plant may have * * * deteriorated to such a degree that effective representation [would be] no longer possible." *Seeler* v. *Trading Port, Inc.*, *supra*, 517 F. 2d at 38.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

JANUARY 1976.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-2899

HAROLD A. BOIRE, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, PLAINTIFF-APPELLANT-CROSS-APPELLEE

v.

PILOT FREIGHT CARRIERS, INC., ET AL., DEFENDANTS-APPELLEES-CROSS-APPELLANTS

July 16, 1975

Appeals from the United States District Court for the Middle District of Florida.

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

GEWIN, Circuit Judge:

This appeal involves the second occasion on which the Regional Director of the NLRB has sought § 10(j) relief in a Florida labor dispute between Pilot Freight Carriers, Inc. (Pilot) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters). Section 10(j) of the Taft-Hartley Act authorizes the NLRB to seek temporary injunctive relief against a party allegedly committing unfair labor practices pending final disposition of the charges by the Board. 29 U.S.C. § 160(j).

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The prior proceeding was aimed at the Teamsters, to keep the union from forcing Pilot to bargain before the legal questions could be determined by the Board. The district court granted relief, and we affirmed. Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 479 F.2d 778 (5th Cir. 1973) (hereinafter cited as Boire v. Teamsters). This case presents the reverse side of the coin, for here the Regional Director seeks temporary relief against Pilot and its dock contractor, BBR of Florida, Inc. (BBR) for claimed coercive tactics designed to impede the employees' organizational efforts. The district court granted the desired relief in part, denied it in part, and we affirm.

Writing on a virtual *tabula rasa*, the Boire v. Teamsters decision, *supra*, set the boundaries of § 10(j) relief in this circuit. Though Judge Goldberg's scholarly opinion has indeed charted our general course, we nonetheless find it necessary to navigate some hitherto unexplored inlets within the "broad harbor" of § 10(j).

Section 10(j) of the Taft-Hartley Act reads as follows:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to

> grant to the Board such temporary relief as it deems just and proper. 29 U.S.C. § 160(j).

The provision was enacted in 1947, despite Congress' general aversion to labor injunctions. In the fifteen years following passage of the Norris-LaGuardia Act, it had become evident that normal NLRB machinery —involving issuance of an unfair labor practice complaint, a hearing before a trial examiner, de novo review by the Board, and an enforcing order by a Court of Appeals—was so time-consuming that guilty parties could violate the Act with impugnity during the years of pending litigation, thereby often rendering a final order ineffectual or futile. *See* Note, 44 N.Y.U.L.Rev. 181 (1969); Note, 45 Texas L.Rev. 358 (1966). Congress therefore gave the labor board a discretionary tool to prevent erosion of the status of the parties pending its final decision.

In an effort to further the principles underlying § 10(j), courts have fashioned a bipartite test for determining the propriety of temporary relief: (1) whether the Board, through its Regional Director, has reasonable cause to believe that unfair labor practices have occurred, and (2) whether injunctive relief is equitably necessary, or, in the words of the statute, "just and proper." Boire v. Teamsters, *supra;* NLRB v. Aerovox Corp. of Myrtle Beach, 389 F.2d 475 (4th Cir. 1967); Minnesota Mining and Manufacturing Co. v. Meter, 385 F.2d 265 (8th Cir. 1967); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967). The first question requires the Board to sustain a minimal burden of proof, but the second demands some exercise of discretion on the part of the trial judge.

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I. Reasonable Cause to Believe

In determining whether reasonable cause exists to believe that unfair labor practices have been committed, the district court need only decide that the Board's theories of law and fact are not insubstantial or frivolous. Boire v. Teamsters, *supra;* Samoff v. Building and Construction Trades Council, 475 F.2d 203 (3d Cir. 1973); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541 (9th Cir. 1969); Schauffler v. Local 1291, 292 F.2d 182 (3d Cir. 1961); but *see* Danielson v. Garment Workers, 494 F.2d 1230 (2d Cir. 1974). The Court of Appeals, in turn, reviews the trial court's factual determinations for clear error and its legal conclusions to determine whether they are correct. Boire v. Teamsters, *supra* at 793. Whether reasonable cause exists, of course, depends upon the facts of a particular case. The scenario pertinent to our decision began shortly after the last Fifth Circuit opinion, in which the relevant facts were copiously detailed. 479 F.2d at 782-86. Briefly, however, some background information is necessary to put the present dispute in perspective. In 1970 the Interstate Commerce Commission granted Pilot Freight Carriers, Inc., a North Carolina corporation, the authority to extend its freight operations as far south as the Florida Keys. Pilot promptly established terminals in Jacksonville, Tampa, Hollywood and Orlando. It did not, however, employ its labor force directly, but instead commissioned men who owned their own trucks, appropriately called owner-operators, to haul freight in the Florida area.

Pilot also commissioned dock contractors, who were responsible for hiring dockworkers. Since 1964 Pilot had been a member of the National Master Freight Agreement, and most of Pilot's employees in other areas of the country were Teamsters. The Teamsters took the position that the Florida operations were an accretion to the pre-existing National Master Freight Agreement, so Pilot's new employees were governed by its terms. Pilot disagreed and filed unfair labor practice charges against the Teamsters for their allegedly illegal organizational activities. In the meantime, a unit clarification petition had been filed to determine the accretion question. The Regional Director petitioned the district court for § 10(j) relief against the Teamsters pending final Board determination of the unfair labor practice charges. As mentioned above, we affirmed the district court's grant of relief.

Subsequent to our decision in Boire v. Teamsters, *supra*, the Board announced its decision in the unit clarification dispute. Released January 31, 1974, the NLRB made four important determinations: (1) the Florida operation was not an accretion to the national bargaining agreement, (2) the owner-operators were employees of Pilot, despite the company's assertions of independent contractor status, (3) Pilot and the dock contractors were joint employers of the dockworkers, and (4) "each of the Florida terminals or the 4 terminals together, may constitute an appropriate unit." Pilot Freight Carriers, Inc. and International Brotherhood of Teamsters, Chauffeurs, Ware-

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housemen and Helpers of America, 208 NLRB No. 138, 1974 CCH NLRB ¶ 26,200.

The Board's decision on the accretion issue spurred the Teamsters to immediate organizing at the Jacksonville terminal. The union's efforts were not limited to owner-operators, but also included the dockworkers who worked on the same premises.

The first employee to sign a union card was Melvynn Johnston, a dockworker. He testified that he signed on February 5, 1974 and sponsored a meeting the next day to convince others to join the Teamsters. Johnston was fired on February 7 by the president of BBR who refused to give any reason for the dismissal.[1] Clarence Brace, one of the first people Johnston

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[1] Johnston testified concerning the circumstances of his discharge:

A. He [the President of BBR] said, "Mel, the reason I called you tonight," he says, "there won't be any need for you to come to work tonight."

And I asked him why. He said, "I'm firing you."

Q. What did you say, if anything, when he said that?

A. I asked him if he was going to give me a reason for firing me. And he said that he didn't have to give me "any goddamm reason."

Q. And what did you say to that, if anything?

A. I asked him if he knew what he was doing. And he says, "Yeah. You know more about what's going on around here than I do." So—

Q. Can you recall anything else that was said in that conversation?

A. I asked him again if he was going to give me a reason for firing me. And he said that he didn't owe me any reason and that he wasn't going to give me one.

(Transcript of 10(j) hearing at 90).

solicited concerning the union, testified that he signed a union card on February 6 and was fired on February 7.

Shortly after the discharges, "no solicitation—no distribution" signs appeared in the employee lounges of the Jacksonville terminal, along with large octagonally shaped "stop" signs that cautioned employees to think before signing union cards. Management of Pilot and BBR continually voiced their opposition to the Union. There was evidence that the president of BBR promised to fire any employees whom he found had signed union cards, though he denied making such statements. Pilot's president and vice-president gave one "captive audience" speech in which they told the drivers that if the union proved successful, the men would no longer be able to drive their own trucks. Instead, they would have to use company equipment, and the company would not purchase their trucks from them. The speech caused grave concern among the owner-operators who had made substantial investments in their equipment. Pilot personnel added that they would continue to treat the drivers as "independent businessmen", despite the NLRB's ruling that they were employees. Management spokesmen for the freight company said they could not afford union wages or collateral union benefits, and the president of BBR stated flatly that the union would break him.

During the second week in February Pilot granted pay increases to the over-the-road and city drivers. The impetus for the wages hikes is hotly contested, as Pilot maintains they were instituted in response to a

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mandatory ICC ruling that an increased fuel surcharge be passed on to the drivers who would pay for fuel. There were, however, additional wage increases in the course of the organizational drive that were inaugurated by Pilot without federal pressure. Pilot also began to allow "double runs", i.e. two men riding in a truck at the same time, thereby increasing the mileage an employee could cover in a given period of time. Again, Pilot maintains that it initiated the double runs at the drivers' behest, because they felt endangered by other operators out on strike. There was evidence, however, from which the Regional Director could conclude that the double runs were a benefit instituted by management to undermine union strength.

Despite management's antagonism to unionization, the employees continued to hold organizational meetings off company property. Growing numbers signed authorization cards, and on February 13 the union announced it had majority support and requested Pilot to bargain. Pilot personnel repeatedly refused.

Based on this evidence, the district court determined that the Board had reasonable cause to believe that Pilot and BBR had violated §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act.[2] § 8(a)(1) declares that an employer commits an

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[2] Specifically, the district court found reasonable cause to believe Pilot and BBR had engaged in various activities to thwart union membership:

> a. threatening the employees with financial loss if they selected the Union;

[Footnote continued on page 9a]

unfair labor practice when he interferes with, restrains, or coerces employees in the exercise of the right to choose a bargaining agent, while § 8(a)(3) prohibits discriminatory discharges, and § 8(a)(5) proscribes employer refusals to bargain. 29 U.S.C. §§ 158(a)(1), (3), and (5).

Despite the testimony chronicled above, Pilot contends the district court lacked authority to make a reasonable cause finding. The employer strenuously asserts that the district court had no evidence on which to base its conclusion that Pilot and BBR are joint employers, thereby making each responsible for the unfair labor practices of the other. Specifically, Pilot argues that since BBR was not Pilot's dock contractor at the time the NLRB considered the unit clarification petition, the district court erroneously relied on the Board opinion to conclude Pilot and BBR were joint employers. We recognize the fact, of course, that the Board decision has no res judicata or collat-

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[2] [Continued]

b. increasing compensation to the over-the-road and local drivers;

c. stating that other increases were being withheld because of the labor dispute with the union;

d. promising the use of Pilot's equipment if drivers would return to work;

e. allowing certain over-the-road trips to be made with two drivers instead of one, thus substantially increasing the pay of each;

f. informing employees that 10 million dollars had been reserved to keep the Union from organizing Pilot's Florida employees; and

g. discharging employees Roy Brace and Melynn (sic) Johnston for their union activities.

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eral estoppel effect—because the parties to the two proceedings were different. Yet the Board spoke in general terms of the dock contractors as a class and found that Pilot personnel directed and supervised the activities of the dockworkers. 1974 CCH NLRB ¶ 26,200 n.14. The record before the district court in the instant case contains similar independent evidence that BBR employees received their instructions on how to fuel the trucks from Pilot dispatchers. Though the dockworkers were hired and paid by BBR, both sets of employees worked on the same premises and enjoyed the same lounge area. Dockworkers ostensibly employed by BBR received notices from management in Pilot envelopes. The president of BBR met with Pilot's counsel to discuss the proper scope of speeches he would deliver to the dockworkers concerning unionism. In these circumstances, the district court's conclusion that there was reasonable cause to believe Pilot and BBR were joint employers was not erroneous.

Pilot attacks many of the other grounds relied upon by the Board for potential unfair labor practices. The employer, for example, claims its motives for the wage increases were pure, the no solicitation rule was legal, the captive audience speeches were within proper bounds, it did not illegally refuse to bargain, etc. Pilot's assertions, however, misconstrue our role. It is not our duty at this juncture to pass upon whether violations have been established by a preponderance of the evidence, but merely to decide that the Board's theories are substantial and not friv-

olous. Boire v. Teamsters, *supra*. We, and the district court, would usurp the Board's statutory powers if we attempted to rule on the unfair labor practice charges. We simply hold that the trial court's factual findings were not clearly erroneous and its legal conclusions were correct. The Board had reasonable cause to believe that Pilot and BBR were committing violations of §§ 8(a)(1), 8(a)(3) and 8(a)(5).[3]

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[3] We note that the Board has recently determined that a § 8(a)(5) violation is not a prerequisite to a bargaining order where the employer's independent § 8(a)(1) or § 8(a)(3) violations are so substantial as to undermine the union's majority status. Steel-Fab, Inc., 221 NLRB No. 25, 1974 CCH NLRB ¶ 26,674. A majority of the NLRB has also ruled that when an employer has violated § 8(a)(1) or § 8(a)(3), but not § 8(a)(5), his duty to bargain does not arise until the Board affirms the administrative law judge's determination that a bargaining order is appropriate. Elm Hill Meats, 213 NLRB No. 100, 1974-75 CCH NLRB ¶ 15,062.

Thus, it might be argued that our finding of reasonable cause to believe Pilot and BBR have violated § 8(a)(5) is superfluous. Our response, however, is severalfold. First, Board law at the time the district court entered its order required a refusal-to-bargain finding in order to begin analysis of whether a *Gissel* order should follow. *See* Steel-Fab, *supra;* NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1818, 23 L.Ed.2d 547 (1969). Second, the Board's recent interpretation of *Gissel*, in *Steel-Fab* and *Elm Hill Meat*, has not been through the crucible of Supreme Court scrutiny to determine its validity. Third, and perhaps most important, our function in this 10(j) proceeding is not to determine whether a violation of the Act has occurred; we need not reconcile the niceties of prior Board practice, approved by the Supreme Court, with its recent declarations. We only decide that the Board *might* find a violation of § 8(a)(5) independent of §§ 8(a)(1) and 8(a)(3), i.e. that its position is not insubstantial or frivolous. Fourth, in view of our disposition of the interim bargaining issue, *infra*, a finding of reasonable cause to believe the em-

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II. Equitable Necessity

Having determined the record before the district court contains substantial evidence to support its finding of reasonable cause, we must now delimit the breadth of relief a district court may order under § 10(j). The statute allows "such temporary relief or restraining order as it [the district court] deems just and proper." 29 U.S.C. § 160(j), a requirement we have given the shorthand label "equitable necessity." Boire v. Teamsters, *supra*. This second prong of the § 10(j) test thus confers a certain range of discretion upon the trial court, reviewable for abuse. Boire v. Teamsters, *supra;* Danielson v. Local 275, 479 F.2d 1033 (2d Cir. 1973); Minnesota Mining and Manufacturing Co. v. Meter, *supra*.

In the present case the district court enjoined Pilot and BBR from violating §§ 8(a)(1), 8(a)(3) and 8(a)(5) in the future—through such activities as financial inducements not to join the union, threats of economic reprisals, discriminatory discharges, and other methods of interfering with employees' organizational rights. The court refused, however, to order mandatory injunctive relief in the form of temporary reinstatement or a temporary bargaining order. It focused on the distinction between prohibitory and

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ployers have violated § 8(a)(5) is not crucial to the case. It simply supplies analytical clarity.

Therefore, whether § 8(a)(5), or § 8(a)(1) and/or § 8(a)(3) standing alone provide the catalyst for a bargaining order, the Board has demonstrated reasonable cause to believe the Act has been violated.

mandatory injunctive remedies, reasoning that a majority of courts have denied mandatory relief because it usurps the Board's powers and prerogatives.

Section 10(j) is itself an extraordinary remedy to be used by the Board only when, in its discretion, an employer or union has committed such egregious unfair labor practices that any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated. Wilson v. Milk Drivers and Dairy Employees Union, Local 471, 491 F.2d 200 (8th Cir. 1974); UAW v. NLRB, 145 U.S.App.D.C. 384, 449 F.2d 1046 (1971); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967). Proper composition of the bargaining unit, reinstatement of unlawfully discharged employees, and certification of the union as bargaining representative are matters generally left to the administrative expertise of the Board. We believe that measures to short-circuit the NLRB's processes should be sparingly employed. While it is true Congress implemented § 10(j) to aid the Board in administration of national labor policy, its scope should not overpower the Board's orderly procedures. Moreover, though traditional rules of equity may not control the proper scope of § 10(j) relief, some measure of equitable principles come into play. *Compare* NLRB v. Aerovox Corp., 389 F.2d 475 (4th Cir. 1967) and Minnesota Mining and Manufacturing Co., *supra*, *with* McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966), vacated 385 U.S. 583, 87 S.Ct. 637, 17 L.Ed.2d 588 (1967) and Danielson v. Garment Workers, 494 F.2d 1230 (2d Cir.

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1974). If the trial court, in its discretion, does not believe that far-reaching mandatory relief would serve the purposes of the Act, it need not grant the full remedy requested by the Board. The Chancellor does not abdicate his powers merely upon a showing that the Regional Director's theories surpass frivolity. *See* Danielson v. Garment Workers, *supra*. He maintains some power to do equity and mold each decree to the necessities of the case.

Here the district court has prohibited Pilot and BBR from committing any unfair labor practices *in futuro*, pending final determination of the charges before the Board. Although a decree enjoining a party from violating the law might appear superfluous at first blush, we believe the order adequately protects the interests of the union, since the employers can be held in contempt if they try to dissipate union strength in any unlawful manner.

Nor did the district court abuse its discretion in failing to order reinstatement of the two employees arguably discharged for union activity. The Board waited three months before petitioning the district court for temporary relief. Although the time span between commission of the alleged unfair labor practices and filing for § 10(j) sanctions is not determinative of whether relief should be granted, it is some evidence that the detrimental effects of the discharges have already taken their toll on the organizational drive. It is questionable whether an order of reinstatement would be any more effective than a final Board order at this point. *See* Note, 44 N.Y.U.L.Rev.

181, 197 (1969); *contra* Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967); Davis v. LeTourneau, 340 F.Supp. 882 (E.D.Tex. 1971). Whether these employees were in fact dismissed for their organizational efforts will be determined by the Board when it brings the full panoply of its resources to bear upon issuance of the final order; the issues are now well preserved for its review. *See* Boire v. Teamsters, *supra.*

To require interim bargaining pending final determination of the union's representative status would prove even more problematical. Here the parties have never enjoyed a bargaining relationship. The union claimed to have a card majority, but no certification election has been held. Maintenance of the status quo is at least one consideration that should enter the § 10(j) equation. Minnesota Mining and Manufacturing Co. v. Meter, *supra;* Schauffler v. Local 1291, *supra;* Brown v. Pacific Telephone and Telegraph Co., 218 F.2d 542 (9th Cir. 1955). As stated by Senator Taft in explaining the purpose of the legislation:

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible

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> for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or *preserve the status quo* pending litigation. 1 Legislative History of the Labor Management Relations Act, 433 (1947) (emphasis supplied).

Moreover, this court has placed strong emphasis on maintaining the status quo, thereby preserving the legal and factual issues for NLRB disposition. Boire v. Teamsters, *supra* at 788, 789, 792, 804.

Our research has disclosed only three district court decisions that treat the question whether a court should order interim bargaining between an employer and an uncertified union pursuant to § 10(j). Two courts denied relief, Fuchs v. Steel-Fab, Inc., 356 F.Supp. 385 (D.Mass. 1973); Kaynard v. Lawrence Rigging, Inc., 80 LRRM 2600 (E.D.N.Y. 1972), and one granted it, Smith v. Old Angus, Inc., 81 LRRM 2936 (D.Md. 1972). While courts have not hesitated to issue interim bargaining orders where a pre-established bargaining relationship is being eroded by unfair labor practices, Brown v. Pacific-Telephone & Telegraph Co., *supra;* Davis v. Servis Equipment Co., 341 F.Supp. 1298 (N.D.Tex. 1972); Lebus v. Manning, Maxwell and Moore, Inc., 218 F.Supp. 702 (W.D.La. 1963), the considerations are very different when the union's representative status has not been certified. We agree with the Eighth Circuit that the status quo to be preserved "is the last uncontested status which preceded the pending controversy." Minnesota Mining & Manufacturing Co., *supra* at 273.

Here the signing of union cards precipitated the entire controversy; hence the *status quo ante* was that period prior to any union activity when the drivers and dockworkers were unrepresented. An interim bargaining order would materially alter that status, creating by judicial fiat a relationship that has never existed. Fuchs v. Steel-Fab, *supra*.

Additional reasons underlie our decision to refrain from commanding temporary bargaining. The Board enjoys primary authority as fact-finder and enforcer of the statutory scheme. Schauffler v. Local 1291, *supra*. When it ultimately rules on the unfair labor practice charges, the NLRB may well decide that a *Gissel*-type bargaining order is appropriate. NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). Yet, absent surrounding unfair labor practices, an employer has no absolute duty to accept a card majority, but may petition the Board for an election. Linden Lumber Division v. NLRB, 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974). Were we to order bargaining on the record before this court, our decision would rest on the assumption that Pilot and BBR had actually committed unfair labor practices—an assumption we are unwilling to make, given that the union has not yet been forced to prove its case by a preponderance of the evidence. We only hold that the district court was amply supported in its conclusion that there was reasonable cause to believe that such practices had been committed. These are matters peculiarly within the investigatory-adjudicatory province of the Board. Moreover, since NLRB

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law concerning when the duty to bargain arises in certain *Gissel* situations has recently shifted, *see* Elm Hill Meats, 213 NLRB No. 100, 1974-75 CCH NLRB ¶ 15,062, *supra* note 3, a present command to bargain might seriously impede orderly Board procedures.

No matter how this court decides the interim bargaining issue, one of the parties stands to be "hurt." If Pilot and BBR are required to bargain with the Teamsters now, our order might prove highly prejudicial to the employers' interests if the Board later determines the union does not enjoy representative status. Similarly, if we fail to require bargaining *pendente lite*, the union will have lost several months of representational services it could have performed on behalf of the employees, assuming the Board decides Local 512 is the employees' chosen bargaining agent. Faced with Scylla and Charybdis, we choose to await the Board's pronouncement. We are not convinced that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover. Finally, then, interim bargaining involves too large a step for this court to take by means of an injunctive vehicle designed to preserve issues for ultimate determination by the Board.

The judgment of the district court is affirmed in all respects.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1974

No. 74-2899

HAROLD A. BOIRE, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
PLAINTIFF-APPELLANT-CROSS-APPELLEE

versus

PILOT FREIGHT CARRIERS, INC., ET AL.,
DEFENDANTS-APPELLEES-CROSS-APPELLANTS

Appeals from the United States District Court for the Middle District of Florida

Before: GEWIN, AINSWORTH and MORGAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

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ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant-cross-appellee pay to defendants-appellees-cross-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Oct. 28, 1975 July 16, 1975

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-2899

HAROLD A. BOIRE, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, PLAINTIFF-APPELLANT CROSS-APPELLEE

v.

PILOT FREIGHT CARRIERS, INC., ET AL., DEFENDANTS-APPELLEES CROSS-APPELLANTS

Oct. 17, 1975

Appeals from the United States District Court for the Middle District of Florida; Wm. Terrell Hodges, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 16, 1975, 5 Cir. 1975, 515 F.2d 1185)

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

In petition for rehearing filed in this case it is contended that the Court failed to give consideration to the Second Circuit opinion in *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975). The Court did consider that decision but did not totally agree with it.

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To the extent that our reasoning differs from the Second Circuit's rationale we decline to follow it.

The Petition for Rehearing is Denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 74-262-Civ-T-H

[Filed Jun. 28, 1974, Tampa, Fla.,
Wesley R. Thies, Clerk]

HAROLD A. BOIRE, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

PILOT FREIGHT CARRIERS, INC. and
BBR OF FLORIDA, INC., RESPONDENTS

ORDER GRANTING TEMPORARY INJUNCTION

This cause came to be heard upon the verified petition of Harold A. Boire, Regional Director of the Twelfth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an Order to show cause why injunctive relief should not be granted or prayed in said petition. The Court, upon consideration of the pleadings, evidence, briefs, argument of counsel, and the entire record in the case has made and filed its Findings of Fact and Conclusions

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of Law, finding and concluding that there is reasonable cause to believe that Respondents have engaged in, and are engaging in acts and conduct in violation of Section 8, subsections (1), (3) and (5) of said Act, affecting commerce within the meaning of Sections 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the consideration of the entire record, it is:

1. ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondent Pilot Freight Carriers, Inc., and Respondent BBR of Florida, Inc., their officers, agents, servants, employees, attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, be and hereby are, enjoined and restrained in the following manner from:

(a) Threatening employees with economic, or other reprisals, because of their activities on behalf of, or membership in, Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein referred to as the Union).

(b) Granting wage increases, or other benefits in order to discourage employees from becoming or remaining members of the Union.

(c) Threatening employees with loss of employment unless they abandon the strike and return to work, and/or soliciting employees to abandon the strike and return to work.

(d) Promising employees wage increases, the use of equipment, or any other new benefits to induce them to abandon the strike and return to work.

(d) Promising employees wage increases, the use of equipment, or any other new benefits to induce them to abandon the strike.

(e) Enforcing any rule discriminatorily prohibiting employees from engaging in discussion of the Union, and/or its activities.

(f) Discouraging membership in the Union, or any other labor organization, by laying off, discharging, or in any other manner terminating the employment of employees, or by discriminating in any other manner in regard to the hire or tenure of employment or any other terms or conditions of employment of any of its employees.

(g) In any other manner or by any other means interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

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DONE and ORDERED at Tampa, Florida, this 28th day of June, 1974.

/s/ Wm. Terrell Hodges
WM. TERRELL HODGES
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 74-262-Civ-T-H

[Filed Jun. 28, 1974, Tampa, Fla.,
Wesley R. Thies, Clerk]

HAROLD A. BOIRE, Regional Director of Region 12 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

PILOT FREIGHT CARRIERS, INC. and
BBR OF FLORIDA, INC., RESPONDENTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the petition filed by the Regional Director of Region 12 of the National Labor Relations Board pursuant to section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(j). The petition, filed on May 13, 1974, sought a temporary injunction to enjoin Respondents, Pilot Freight Carriers, Inc. and BBR of Florida, Inc., from engaging in certain conduct alleged to constitute violations of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3) and 158(a)(5), and to require certain affirmative remedial action on the part of the Respondents pending ultimate disposition of

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those issues in an appropriate unfair labor practice proceeding before the Board. A hearing was held on May 16 and 17, at which time Petitioner presented his case-in-chief. Due to the time constraints of the Court's calendar, however, Respondents were unable to proceed at that time and were given until May 31 to present their case by affidavits or other documents. Respondent Pilot has now filed affidavits and exhibits.* Therefore, various pending motions as well as the merits of the petition for preliminary injunction are ready for decision.

I. BACKGROUND

The present proceeding represents another stage in a long-standing dispute between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Pilot Freight Carriers, Inc., which has been here before. See *Boire v. Teamsters*, 72-564 Civ. T-H. Without repeating the complete history of the dispute, which is recited by the Court of Appeals in the aforementioned case, 479 F.2d 778, 782-786 (5th Cir. 1973), it can be said generally that Pilot is a motor carrier of general commodity freight with its principal offices in Winston-Salem, North Carolina. Prior to August, 1970, Pilot served the eastern portion of the United States from New England to Georgia, and west to Ohio. On the

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* Respondent BBR appeared at the hearing through its President, Harvey Lane, and is not represented by counsel. BBR has filed no affidavit or other documents.

whole, Pilot's employees were members of the Teamsters Union, and since 1964 Pilot has been a signatory to the National Master Freight Agreement (NMFA), a collective bargaining contract periodically negotiated and renewed by the Teamsters and a multi-employer association of which Pilot is a member.

In August, 1970, after five years of litigation, the Interstate Commerce Commission granted authority to Pilot to extend its routes south into Florida. Pilot promptly opened terminals in Jacksonville, Tampa, Hollywood and Orlando, using 140 to 160 non-union employees. Pilot, however, did not directly employ this labor force. Instead, the over-the-road truck drivers and the local city pick-up and delivery truck drivers were owner-operators of their vehicles, while the terminal dockworkers were employed by independent labor contractors. The Teamsters took the position that the employees associated with Pilot's Florida operation constituted an accretion to the bargaining unit and that their wages, hours and working conditions were governed by the NMFA. Pilot argued, however, that the accretion provisions of the NMFA did not apply and that the Florida employees were unrepresented.

The issue of the Teamsters' entitlement to represent the Florida employees was brought to litigation in mid-1972 in three separate forums:

1. A charge was filed by the Teamsters pursuant to the grievance provisions of the NMFA. The grievance was taken to arbitration, and on August 21,

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1972, the arbitrators rendered a decision in favor of the Union.

2. A unit clarification proceeding was initiated by Pilot before the National Labor Relations Board. On January 31, 1974, the Board issued its decision, *Pilot Freight Carriers, Inc.*, 208 N.L.R.B. No. 138 (1974), holding that the truck drivers were employees of Pilot, that the dockworkers were joint employees of Pilot, and that the Florida operation did not constitute an accretion to the existing national unit. Instead, "each of the Florida terminals or the 4 terminals together, may constitute an appropriate unit." 208 N.L.R.B. No. 138, at 17.

3. An unfair labor practice proceeding was initiated by Pilot before the Board alleging that the Teamsters' attempts to gain representation of the Florida workers by enforcing the arbitration decision constituted a violation of sections 8(b)(1)(A) and 8(b)(3) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and 158(b)(3). On September 29, 1972, this Court entered a section 10(j) injunction against the Teamsters in *Boire v. Teamsters*, 72-564 Civ-T-H, *aff'd* 476 F.2d 778 (5th Cir. 1973), which presently remains in effect. However, on October 12, 1972, the Board's unfair labor practice proceeding was stayed pending the outcome of the unit clarification proceeding, and, to the knowledge of the Court, the matter is still being held in abeyance.

Following the Board's unit clarification decision of January 31, 1974, the Teamsters began an organization campaign among the workers at Pilot's Jackson-

ville terminal. The present petition is the result of certain disputes arising out of that campaign.

II. MOTIONS

It is first necessary to dispose of certain motions now pending before the Court:

1. On May 16, 1974, Pilot filed a motion to strike various paragraphs of the petition as legally insufficient. That motion is hereby DENIED.

2. On May 16, 1974, Pilot filed a motion to dismiss the petition for failure to state a claim upon which relief can be granted. That motion is hereby DENIED. *Cook & Nichol, Inc. v. Plimosoll Club*, 451 F.2d 505 (5th Cir. 1971).

3. On May 15, 1974, Truck Drivers, Warehousemen and Helpers Local Union No. 512, filed a motion to intervene, claiming an interest in this proceeding arising from its role as charging party in the underlying unfair labor practice proceeding. That motion is hereby DENIED. See the unreported order of Judge Bryan Simpson, dated January 19, 1968, denying a charging party's motion to intervene in a § 10(j) appeal, *Firestone Synthetic Rubber & Latex Co. v. Potter*, 5th Cir., No. 25577.

4. On May 16, 1974, a motion to intervene was filed on behalf of four Pilot truck owner-operators who are plaintiffs in an action in the Jacksonville Division of this Court brought to compel the Board to process a petition for certification and to conduct an election, as required. *Bover v. Pilot Freight Car-*

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riers, Inc., 74-275-Civ-J-S. As owner-operators under contract with Pilot, these drivers have been determined in the Board's unit clarification proceeding to be employees of Pilot within the meaning of the Act. Accordingly, to the extent they are attempting here to protect their section 7 rights, 29 U.S.C. § 157, their interest is adequately represented by the Board and they are not entitled to intervene as of right under Rule 24(a), F.R.Civ.P. Further, for the same reasons, any employee would have an equal claim to permissive intervention under Rule 24(b), and this should not be permitted. This motion to intervene is also DENIED.

5. On May 30, 1974, Pilot filed a motion for reconsideration of a certain discovery order. On May 24, the Court entered an order quashing a subpoena duces tecum served by Pilot requiring Petitioner Boire to produce "[c]opies of all advice and appeal memoranda or other memoranda indicating the legal theory upon which the General Counsel is proceeding in cases 12-CP-173, 12-CA-6288 and 12-CA-6267," the underlying unfair labor practice proceedings. In addition, the order protected Petitioner Boire from a notice of deposition served by Pilot. Pilot's instant motion for reconsideration contains no new legal authority or argument not before the Court when the May 24 order was issued. Accordingly, the motion for reconsideration is hereby DENIED.

6. On June 7, 1974, Pilot filed a motion to reopen the record for the purpose of introducing into evidence three affidavits and a copy of an unfair labor

practice charge concerning an incident occurring on May 31 in Philadelphia. This motion if hereby GRANTED, and the Court will consider Respondent's Exhibits 15(a) through (d) together with the affidavits and exhibits filed by it on May 31.

Having disposed of the pending motions in the case, the Court can now proceed to the merits of the petition for preliminary injunction.

III. MERITS

On February 19, March 6 and April 26, 1974, Teamsters Local 512 filed charges before the National Labor Relations Board accusing Pilot and BBR of violating section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. The Board consolidated these cases as 12-CA-6267 and 12-CA-6288, and issued a complaint on May 6, 1974. Here, the Board seeks section 10(j) relief pending ultimate disposition of these issues by the Board.

Section 10(j) of the National Labor Relations Act provides, in part:

> The Board shall have power, upon issuance of a complaint that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j).

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"Essentially, the relevant authority mandates two prerequisites before an injunction is appropriate. First, there must be come showing that the injunction is equitably necessary, and second, the Board must have 'reasonable cause' to believe unfair labor practices are actually taking place." *Boire v. Teamsters, supra,* 479 F.2d at 787.

A. *Reasonable Cause to Believe Unfair Labor Practices are Taking Place.*

In support of its petition, the Board presented testimony and evidence at the May 16 and 17 hearing. Specifically, the Board's evidence tended to show:

1. Respondent Pilot is a North Carolina corporation with its principal office and place of business located in Winston-Salem, North Carolina, where it is engaged in the business of transporting freight by motor vehicle pursuant to authority granted by the Interstate Commerce Commission over routes extending from New England to the Florida Keys and as far west as Ohio. During the past 12 months, Pilot has received in excess of $50,000 gross revenue from its interstate transportation of freight, and has been, at all material times, engaged in commerce or an industry affecting commerce within the meaning of sections 2(6) and (7) of the Act, 29 U.S.C. §§ 152(6) and (7).

2. Respondent, BBR of Florida, Inc., is a Florida corporation with its principal office and place of business located in Jacksonville, Florida, where, pursuant to a contract with Pilot, it is engaged in the business

of performing certain dock work at Pilot's terminal. BBR became Pilot's Jacksonville dock contractor on January 26 or 27, 1974, and since that time has had gross revenues in excess of $50,000. At all times material, it has engaged in commerce or an industry affecting commerce within the meaning of sections 2(6) and (7) of the Act, 29 U.S.C. §§ 152(6) and (7).

3. Truck Drivers, Warehousemen & Helpers Local No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment. It is a labor organization within the meaning of section 2(5) of the Act, 29 U.S.C. § 152(5).

4. Beginning on or about February 4, 1974, Teamsters Local No. 512, hereinafter referred to as the Union, began a campaign to organize the regular and part-time employees working at Pilot's Jacksonville terminal. Those employees, composing an appropriate unit for the purpose of collective bargaining within the meaning of section 9(b) of the Act, 29 U.S.C. § 159(b), can be grouped generally into the following classifications:

a. Over-the-road truck drivers or owner-operators working for Pilot pursuant to contract;

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b. City pick-up and delivery truck drivers or owner-operators working for Pilot pursuant to contract; and

c. Dockworkers jointly employed by Pilot and BBR.

5. On or about February 13, 1974, a majority of the employees described above had signed union authorization cards thereby designating the Union as their bargaining representative.

6. Commencing on or about February 13, 1974, the Union requested, and is requesting, Pilot and BBR to bargain collectively with respect to the employees' wages, hours and other terms and conditions of employment. However, since that time, and particularly on February 18, 21 and 26, 1974, Pilot and BBR have refused.

7. Since on or about January 26, 1974, and continuing to date, there is evidence that Pilot and BBR have engaged in a course of conduct to thwart and discourage membership in the Union and to interfere with, restrain and coerce their employees in the exercise of their section 7 rights by, among other activities:

a. Threatening employees with financial loss if they selected the Union;

b. increasing compensation to the over-the-road and local drivers;

c. stating that other increases were being withheld because of the labor dispute with the Union;

d. promising the use of Pilot's equipment if drivers would return to work;

e. allowing certain over-the-road trips to be made with two drivers instead of one, thus substantially increasing the pay of each;

f. informing employees that 10 million dollars had been reserved to keep the Union from organizing Pilot's Florida employees; and

g. discharging employees Roy Brace and Melvynn Johnston for their union activities.

8. On or about February 25, 1974, and continuing to date, certain employees of Pilot and BBR employed at the Jacksonville terminal ceased work concertedly and went on strike.

While Pilot disputes in its affidavits and exhibits filed May 31 many of these facts as presented by the Board at the hearing, the Court finds that, under the standards announced in *Boire v. Teamsters, supra,* 479 F.2d at 789-792, there is reasonable cause to believe that unfair labor practices in violation of sections 8(a)(1), 8(a)(3) and 8(a)(5) have been committed, and are being committed, by Pilot and BBR as alleged. In other words, the Board's theories of fact and law are not insubstantial or frivolous.

B. *Need for Temporary Equitable Relief.*

The Board's petition prays for the entry of a section 10(j) injunction enjoining and restraining Pilot and BBR, pending final Board disposition, from threatening their employees, granting or promising benefits, enforcing a no-solicitation rule, discouraging union membership, and in any other manner interfering with, restraining or coercing employees in the

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exercise of their section 7 rights. In addition, the petition seeks to require Pilot and BBR affirmatively to reinstate employees Roy Brace and Melynn Johnston, and to recognize and bargain with the Union as the exclusive bargaining representative of the unit composed of the Jacksonville drivers and dockworkers.

The Court has no difficulty in determining that the Board has shown the required equitable need with respect to its request for prohibitory injunctive relief. It is clear that if Pilot and BBR continue their activities, which the Board has reason to believe constitute unfair labor practices, one of two possible results will obtain. If the Union resists these practices, as it has, the present strike against Pilot and BBR will continue indefinitely, resulting in great financial losses to the parties, as well as to the public as a whole. On the other hand, if the Union succumbs and does not oppose the activities of Pilot and BBR, and if the Board later determines that Pilot and BBR have in fact committed unfair labor practices, then the Board may well be rendered impotent by the passage of time to remedy effectively the violations. That is, during the time required by the Board to ultimately decide these matters,* Pilot and BBR would be able to obtain a work force devoid of union support so that, as a practical matter, a *Gissel*-type ** bargain-

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* In Judge Goldberg's opinion in *Boire* v. *Teamsters*, *supra*, he refers eloquently to "[t]he notoriously glacial immobility of the Board." 479 F.2d at 788.

** N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918 (1969).

ing order will be meaningless. This is exactly the sort of *fait accompli* that section 10(j) is designed to prevent. *Boire v. Teamsters, supra*, 479 F.2d at 787-788.

It might be argued that the type of prohibitory injunction here contemplated is nothing more than an injunction not to violate the Act. If Pilot and BBR are not presently violating the Act, an issue ultimately to be determined by the Board, they cannot be harmed by the issuance of such an injunction. However, if they are presently violating the Act, as the Board has reasonable cause to believe, the entry of such an injunction will have the effect simply of arresting the "action as by adding to some clear command of the statute a reinforcing order that will afford the power to punish a described disobedience of it as a contempt." *Kaynard v. Lawrence Rigging, Inc.*, 80 L.R.R.M. 2600, 2604 (E.D. N.Y. 1972).

The Court views in an entirely different light, however, the request for mandatory injunctive relief. While, as a practical matter, Pilot's and BBR's continued refusal to bargain with the Union pending the outcome of the unfair labor practice proceeding may have the same result as their continuation of threats, promising and granting benefits, and other coercive activities, the entry of a mandatory injunction would go farther than the statute allows. Counsel have cited, and the Court is aware of, only three reported decisions dealing with the inclusion of a bargaining order as part of a section 10(j) injunction in the absence of a prior bargaining relationship between the parties

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with respect to the appropriate unit of employees involved in the dispute.* Of these three cases, *Fuchs v. Steel-Fab, Inc.*, 356 F.Supp. 385, 83 L.R.R.M. 2635 (D. Mass. 1973), and *Kaynard v. Lawrence Rigging, Inc.*, 80 L.R.R.M. 2600 (E.D. N.Y. 1972), denied the requested relief; only *Smith v. Old Angus, Inc.*, 81 L.R.R.M. 2936 (D.Md. 1972), granted it. Upon consideration of these authorities, the Court believes that the result obtained in *Steel Fab* and *Lawrence Rigging* represents the correct interpretation and application of the statute.

One of the purposes of a section 10(j) injunction is to preserve the status quo so that the Board's processes may be effective following its consideration and adjudication of the case on its merits. If Pilot and BBR are finally determined by the Board to have committed a section 8(a)(5) unfair labor practice, as the Board now has reasonable cause to believe, then a *Gissel*-type bargaining order may be one of the remedies available to the Board. However, to enter such a bargaining order in the form of a section 10(j) injunction would not preserve the status quo. Rather, it would permanently change the relationship between the parties since the imposition of a duty to bargain in good faith implies the making of a valid collective bargaining agreement which would normally have a

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* Where there has been a prior bargaining relationship, district courts have had no difficulty in granting this type of relief. For example, *Humphrey* v. *Retired Persons Pharmacy*, 84 L.R.R.M. 2599 (D.D.C. 1973); *Balicer* v. *Melrose Binder, Inc.*, 82 L.R.R.M. 2891 (D.N.J. 1972); *Davis* v. *Servis Equip. Co.*, 241 F. Supp. 1298, 80 L.R.R.M. 2020 (M.D. Tex. 1972).

duration unrelated to the time the Board requires to conduct the underlying unfair labor practice proceeding. Should Pilot and BBR prevail before the Board, then a section 10(j) bargaining order may well have produced a converse kind of *fait accompli* that section 10(j) is designed to prevent, not to authorize.

The merits of the underlying unfair labor practice are within the exclusive jurisdiction of the National Labor Relations Board. The present case involves hotly contested issues of fact and unresolved questions of employee count and card validity. Those issues, in their present posture, cannot be decided by this Court which has authority only to apply the reasonable-cause-to-believe standard. Whatever may be the scope of section 10(j) injunctive relief in cases in which there are no genuine issues of material fact and in which only pure questions of law are presented, it does seem clear that this Court has no authority to enter what amounts to final relief on a disputed record.

For these reasons, the Court rejects the Board's request for affirmative injunctive relief requiring Pilot and BBR to recognize and bargain with the Union and to reinstate the discharged employees. However, a prohibitory injunction, in an appropriate form, will be entered.

DONE AND ORDERED at Tampa, Florida, this 28th day of June, 1974.

/s/ Wm. Terrell Hodges
WM. TERRELL HODGES
United States District Judge

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APPENDIX D

August 15, 1974
Winston-Salem, North Carolina

Pilot Freight Carriers, Inc., hereinafter called "Company," and Teamsters Local 512, hereinafter called "512," agree as follows:

1. It is agreed that the question of recognition for dock workers at the Jacksonville, Florida terminal is to be resolved by the decision of the National Labor Relations Board in litigation pending at this time. It is further agreed by the Company and 512 that no effort will be made by either party hereto, to reopen the record in that pending litigation, or to use this agreement to influence the National Labor Relations Board or the Courts in their final determination of that pending litigation. It is further agreed that the final decision of the NLRB or the Courts in such litigation shall not nullify this agreement as to the drivers at the Jacksonville, Florida terminal.

2. It is agreed that the question of recognition for owner-operator drivers (local and road) is to be resolved by a card check of all owner-operator drivers of record as of February 14, 1974, at the Jacksonville, Florida terminal.

   It is further agreed that in the event Local 512 is successful in the card check provided for above, the following terms and conditions shall thereafter apply:

a. All owner-operator drivers shall be permitted to continue under the terms of their current owner-operator contract with Pilot Freight Carriers, Inc. until March 31, 1976.

b. It is also agreed that the terms of the National Master Freight Agreement shall apply, as amended, by deleting Article 2, Section 3 (Non-Covered Units), Article 3, Section 1(a), paragraph 2 (Recognition), Article 22 (Owner-Operators), Article 23 (Separation of Employment), Article 33 (Cost of Living) and amend Article 39 (Duration) to become effective August 17, 1974.

c. *Road owner-operators*: The terms of the Southern Conference Road Supplemental Agreement shall apply, as amended, by deleting Article 42, Section 4 (Seniority), Article 48 (Lodging), Article 50 (Paid-For Time General), Article 51 (Mileage and Hourly Rates), Article 52 (Guarantees), Article 53 (Subsequent Run), Article 54 (Sleeper Operation), Article 55 (Owner-Operators), Article 56 (Vacations), Article 57 (Holidays), Article 60 (Steel Haul Only), Article 61 (Perishable Commodities Only), Article 62 (Funeral Leave), and amend Article 58 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 59 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

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Also, where there is an increase in the Company's freight tariff rates a like adjustment will be made in the mileage rates and/or other allowances provided under the owner-operator's contract referred to in sub-paragraph (a) above. (I.E.—a 5% increase in the freight tariff rate would result in a 5% increase in the mileage rate; thus, a 34¢ per mile rate would be increased by 1.7¢ per mile).

d. *Local Owner-Operators*: The terms of the Southern Conference Local Supplemental Agreement shall apply, as amended, by deleting Article 52 (Vacations), Article 53 (Holidays), Article 54 (Paid-For Time General), Article 55 (Wages and Hours), Article 56 (Leased Equipment), Article 57 (Funeral Leave), and amend Article 50 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 51 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

Also, where there is an increase in the Company's freight tariff rate it will automatically reflect an increase in compensation under the owner-operators' contract referred to in sub-paragraph (a) above.

3. Any owner-operator driver who desires to cancel his lease agreement prior to March 31, 1976 may do so by giving the Company seventy-two (72) hours' written notice. At the time of giving such notice the owner-operator driver must also indicate if he desires to be placed on Company equipment.

Where any owner-operator driver elects to cancel his lease and be placed on Company equipment, he shall work under all the terms of the National Master Freight Agreement, except that Article 2, Section 5 (Non-Covered Units) and Article 3, Section 1(a), paragraph 2 (Recognition) shall not apply. Such owner-operator driver shall also work under all the terms of the appropriate Southern Conference Supplemental Agreement (local or road), except Pension payments shall become effective March 1, 1976 and the amount shall be $22.00 per week.

4. This agreement shall become effective immediately upon ratification by the members of 512 and all picketing of Pilot Freight Carriers, Inc. by 512 shall cease immediately, and in no event later than 12:00 o'clock Noon on August 17, 1974.

FOR PILOT FREIGHT CARRIERS, INC.

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FOR TEAMSTERS LOCAL UNION 512

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APPENDIX E

[December 23, 1974]

Jacksonville, Fla.
JD-785-74

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES
WASHINGTON, D. C.

PILOT FREIGHT CARRIERS, INC.

and

BBR OF FLORIDA, INC.

and

TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 512, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

John C. Wooten, Esq., and *George Barford, Esq.*, for the General Counsel.

L.N.D. Wells, Jr., Esq., and *Frank E. Hamilton, Jr., Esq.*, for the Charging Party.

James Blue, Esq., and *J.W. Alexander, Jr., Esq.*, for the Respondent.

Harvey W. Lane, appearing on behalf of Respondent BBR of Florida, Inc.

DECISION

Statement of the Case

PHIL SAUNDERS, Administrative Judge: Pursuant to charges filed by Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union or Charging Party, a complaint was issued on May 6, 1974,[1] against Pilot Freight Carriers, Inc., and BBR of Florida, Inc., herein referred to as Pilot and BBR, or collectively as Respondents, alleging violations of Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act, as amended. Respondents filed answers to the alleged unfair labor practices. A hearing in this proceeding was held before me during various dates in July and August and the General Counsel, the Charging Party, and the Respondents have filed briefs in this matter. All rulings reserved during the trial are disposed of in accordance with my findings herein.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. *The Business of Respondent*

Pilot is a North Carolina corporation with its principal offices located in Winston-Salem, North Carolina,

[1] All dates are 1974 unless specifically stated otherwise.

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where it is engaged in a common carrier in the transport of freight by motor vehicle under authority granted by the Interstate Commerce Commission, and over routes extending from New England to the Florida Keys and as far west as the State of Ohio.

During the past 12 months Pilot has received in excess of $50,000 gross revenue from its interstate transportation of motor freight.

BBR is a Florida corporation with its principal office and place of business located in Jacksonville, Florida, where, pursuant to a contract with Pilot, it is engaged in the business of performing certain dock work for Pilot, including the furnishing of dock labor at Respondent Pilot's Jacksonville, Florida, terminal.

During the past 12 months BBR has performed services valued in excess of $50,000 for Pilot, who in turn has received during the same period of time, in excess of $50,000 gross revenue from its interstate transportation of motor freight.

Pilot and BBR are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

The main issues in this case are whether the Respondents are joint-employers; whether Respondents violated Section 8(a)(1) of the Act by the statements and remarks subsequently detailed herein; whether the Act was violated in the discharge of Roy Brace and Melvynn Johnston; whether the Act was violated with regard to the hire and tenure of Donald Croft; and whether Respondents violated the Act by refusing to bargain with the Union as the majority representative of the employees in an appropriate unit. Additional issues are whether the strike was an unfair-labor-practice strike, and the appropriate remedy.

Background

For many years Pilot operated its trucking lines in several of the eastern and south-eastern states, but did not have authority from the ICC to operate in Florida, and as a result had to "interline" with various motor carriers who did possess such authority. In 1965 Pilot filed an application with the ICC to operate in Florida, and some years later was given such authority. In 1970 Pilot established a truck terminal in Jacksonville and shortly thereafter opened terminals in Hollywood, Orlando, and Tampa.

It appears that in 1971 Pilot decided to operate its Florida terminals in a different fashion from the rest of its nationwide system, and drivers then working for Pilot were notified that they would have to purchase a tractor and lease it to Pilot as an independent contractor, and as a result these individuals and

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drivers became owners of their own tractors and each entered into leasing contracts with Pilot for the use of their equipment. These contracts made the owner-operators responsible for the maintenance and upkeep of their own equipment and also for all taxes, license and tag fees.

Dockworkers at these Pilot terminals in Florida were obtained from various labor supply firms who executed dock contractor agreements with Pilot. In general, these agreements also attempted to make the dock contractor an independent contractor, and in most instances expressly provided that neither the dock contractor nor its employees were to be considered employees of Pilot. The Board, however, concluded in its unit clarification decision, *Pilot Freight Carriers, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 208 NLRB No. 138—Cases 12-UC-21 and 12-UC-23, that the people working as dockworkers in Florida were employees of both Pilot and the dock contractor. At the time the Board's decision issued, on January 31, BBR was the dock contractor at Pilot's Jacksonville, terminal.[2]

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[2] It appears from this record that the Jacksonville dock was Pilot's own operation until June 1972, when Frank Floyd d/b/a Contract Freight was employed, but Floyd's contract was terminated on November 16, 1973, when BBR (Harvey Lane) was then briefly employed as the dock contractor, but Lane gave his notice of termination on November 23, 1973. Lane was followed by Professional Driver Services, and they operated the Jacksonville dock until December 8, 1973, but on this date Pilot again took over and operated the dock until

For some time Pilot continued to run its Florida operations as outlined above, but in 1972 the Florida locals of the Teamsters filed grievances alleging that Pilot was in violation of the 1970-73 National Master Freight Agreement by not recognizing the Florida locals as the bargaining representatives of its Florida employees, and by not applying the National Master Freight Agreement of the Teamsters to the Florida employees. Their claim for representation was based primarily on the contention that under the NMFA Pilot's employees had been "accreted" into the collective-bargaining unit as set out in that Agreement, and under the grievance machinery of their contract the locals obtained an arbitration award in 1972 holding that Pilot's Florida operations were covered by the terms and conditions of the NMFA and the applicable Area Supplements. In July, 1972, the Unions struck Pilot nationwide to enforce this award, but the strike was enjoined on the grounds that the parties had failed to exhaust the grievance machinery. Thereafter, the locals obtained a second arbitration award and which in effect upheld the first award. As further pointed out, during this period of time Pilot filed a unit clarification petition with the National Labor Relations Board, as aforestated, seeking to have the Board exclude its employees working in the Florida system from the National bargaining unit, and the Board in its decision on January 31 excluded the

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January 27, 1974, when BBR once again became the dock contractor, and up to the present time BBR continues in this capacity.

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Florida employees from the bargaining unit set out in the National Master Freight Agreement.[3]

Sometime prior to the Board's January 31 decision in the unit clarification case, the parties had become generally aware of its pending announcement. In fact, both the city and over-the-road drivers for Pilot had sought and been granted separate meetings with Pilot's management in Florida to air their dissatisfactions and requests for increased wages and improved conditions.[4]

During the first week in February, employee Melvynn Johnston of BBR had secured authorization cards from the Union, and within a few days numerous card signatures from employees were readily obtained. Johnston and Brace were fired by Harvey Lane of BBR on February 7.[5] Between February 7

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[3] The Board's decision in the unit clarification case basically found: (1) That the truckdrivers and dockworkers employed by Pilot in the Florida Region were not accretions to the National bargaining unit; (2) that the truckdrivers were employees of Pilot and not "independent contractors" as contended by Pilot; and (3) that Pilot and its dock contractor were "joint employers" of the dockworkers. The Board also held that an appropriate unit consisted of the employees working at a single "Florida terminal" or in the alternative, the employees employed at all four terminals.

[4] The meeting with the over-the-road drivers had been requested through driver Don Croft and was held on January 20. The meeting with city drivers was arranged through driver Denny Swain and was held with Pilot Officials on January 24.

[5] About the middle of February Pilot also posted a series of signs or posters in the Jacksonville terminal. A large bright red octagonal "STOP" sign was addressed to those consider-

and 12, officials of Respondents held numerous meetings with the employees at the Florida terminals including Jacksonville, and on February 13 the Union sent a letter to Pilot demanding recognition.[6] The strike started on February 25, and on March 5 and 7 Pilot officials held meetings with strikers. On May 16 and 17, a 10-J proceeding in Federal Court was held in Tampa.

It is alleged that Pilot and BBR are joint-employers of the dockworkers employed at Pilot's *Jacksonville* terminal.

Harvey Lane, President of BBR, testified that his company was formed in October, 1973, that he is the major stockholder of BBR, that Pilot owns no stock, and stated he received no financial help from Pilot in forming BBR. Lane testified that after January 27—when he signed his current dock contract with

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ing signing a union card. Another poster advised that the United States government desired employees to shun the Teamsters, and another painted the Union as arsonists and bombers. See Charging Party Exhibit Nos. 5, 6 and 7. In addition to the above all dock personnel received in February as attachment to their paycheck, instructing employees ". . . NOT TO SIGN ANYTHING . . . deprecating "OUTSIDERS," "emphasizing COSTS . . . MONTHLY DUES . . . INITIATION FEES . . FINES AND ASSESSMENTS . . ." and ending with the flat admission, "Already, many employees have brought the union cards into us. . . ." See Charging Party Exhibit No. 8.

[6] Normally, the Board considers the crucial period the intervals following the demand for recognition, but in this case the crucial or critical period must date from the Board's decision in the unit clarification proceeding, January 31, as will become increasingly obvious from events detailed herein.

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Pilot and commenced his operations at the Jacksonville terminals—he employed approximately 109 employees, and of this number only 25 to 30 had any prior connection with Pilot, and that none of BBR's supervisors had ever been employed by Pilot. Lane said that he obtained his employees from various independent sources, and also testified that BBR used its own employment application blanks, and that he himself interviewed most of the applicants.

It appears that when Lane started the dock operations on January 27, his starting rate was 25 cents per hour lower than that paid by its predecessor, Professional Driving Services, and Lane said he was not aware of what the predecessor was paying for dockworkers and switchers at the time he decided upon the $3.75 and $4 rates for dockmen and switchers respectively, and that prior to determining his pay scale, he had contacted two trucking industry engineers who were employed by R.C. Motor Lines, a Pilot competitor. Lane further stated that he established his own work rules and never discussed them with any Pilot people, that he maintained a separate payroll and his employees are paid by checks drawn against BBR, testified that he initially made substantial changes in the dock set-up at the time he started his operations in late January, that there have been no temporary or permanent employee transfers from BBR to Pilot or from Pilot to BBR, and also said that most all the equipment used on the dock is furnished by BBR.

The Union maintains that Lane's relationship to Pilot cannot be viewed merely in the isolation of the

time frame beginning January 27, but must be viewed in the context of Pilot's operations in Jacksonville from the inception, and argues that when viewed in this context it becomes clear that Pilot and its dock contractor BBR are jointly responsible for the working conditions on the Jacksonville dock.

The Charging Party points out that the attempts to picture BBR as independent of Pilot ignores that Harvey Lane had no previous separate business or corporate existence, but Lane, like many others, was a truckdriver for Pilot from April 1973, until November, 1973, when for 8 days he acted as dock contractor replacing Franklin Floyd, as aforestated, and then returned to driving over-the-road for Pilot. It is further argued that the incorporation of BBR in October, 1973, was only a few days prior to Pilot's putting Lane in Floyd's place and his only client was Pilot—with whom he signed a dock contract admittedly similar to Floyd's.

The present dock contract between Pilot and Lane (Respondent Pilot Exhibit No. 28) was signed by Hobert Miller, Pilot's Florida Regional Manager, and Lane at midnight, January 26-27. The Union asserts that while this contract on its fact tends to show an arms-length relationship with BBR, in reality its merely a "transparent effort" to paper over the actual relationship between Pilot and BBR. It is further pointed out that the January 27 contract duplicates the contract between Pilot and Franklin Floyd, the November BBR contract, and also duplicates the contract with Professional Driver Services. There is also

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the contention by the Union that the January 27 contract between Lane and Pilot purports to empower BBR to perform functions neither intended nor executed, such as supervision of drivers and selection of routes, while on the other hand, it does not cover much that is actually performed—such as switching and fueling.

It appears to me that the evidence in this record shows that Pilot does take part in determining matters governing essential terms and conditions of employment of BBR's dockworkers at the terminal here in question, and in accordance therewith, I find that Pilot and BBR are joint-employers of the dockworkers employed at Pilot's Jacksonville terminal. This record adequately reflects that Pilot's previous and intermittent employment of dockworkers has not been completely terminated by the signing of the January 27 dock contract with BBR.

Any discussion of the existence or nonexistence of a joint-employer relationship between Pilot and BBR must, of course, necessarily begin with the recent Board decision in the prolonged unit clarification hearing in *Pilot Freight Carriers, Inc., supra,* and wherein the Board found a joint-employer status as between Pilot and their then existing dock contractors. During the interval of the clarification proceeding, Franklin Floyd was the main dock contractor for Pilot at Jacksonville and the one considered by the Board, but nevertheless, it appears that Floyd exercised some of the same functions that Lane now per-

forms. Floyd granted wage increases to his employees, he interviewed job applicants, discharged employees, had his own dock supervisors, and Floyd also maintained that Pilot personnel did not supervise his dockwork force. Harvey Lane makes these same contentions for BBR in the instant case.

In the unit clarification proceeding and decision the Board also considered the dock relationships at the Orlando and Tampa terminals, but the most detailed evidence proffered related to the operations in 1972 at the Miami terminal. In relations to the Miami dock at the time of the UC cases, there is no question, as noted by the Board, but that Pilot exercised considerable control of hiring practices, wages, and supervision of its dock contractors (Employer's Overload and B & B Cartage Co.) at this terminal. However, after B & B Cartage Co. became the Miami dock contractor in July, 1972, Pilot did not exercise any supervision over the dock except for the break-in period, and when there were rush loads and no one else was available.

In the instant case the Charging Party introduced evidence into this record bearing on Pilot's supervision and direction over BBR. It appears that before BBR took over the dock at Jacksonville in late January, Levi Starling worked as a dock foreman for Pilot in charge of loading and routing city freights, and Melvynn Johnston credibly testified that at the present time Starling is still working for Pilot but performing the same duties as before, and the advent of

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BBR has not changed his job on the dock in any way.[7] Johnston also testified that Jerome Salmon is a dockworker but he had overheard Pilot's foreman Starling reprimand Salmon after Lane had taken over the dock operations at Jacksonville. On this occasion Starling told Salmon, "You dumb S.O.B., you've got the westside freight on the southside trailer. Now, get this freight off of this trailer and get it on that one."

Curtis MacDowell also works for BBR as a dock loader at Jacksonville, and testified that he and other BBR employees have received instructions and directions from Pilot personnel. MacDowell gave credited testimony to the effect that Pilot dispatcher Ron Oglesbee instructed him to load a pickup truck with some heavy equipment, and on this occasion Oglesbee also directed employee John Meyers to help him and both MacDowell and Meyers were working with other trucks at the time Oglesbee spoke to them. MacDowell further testified that in February—2 weeks before the strike—Pilot's operations manager at Jacksonville, Wilbur Powell, told him to unload a truck because the freight had been put on the wrong trailer, and at the time MacDowell received these instructions from Powell he was working on another truck.

MacDowell classified Ron Johnson as an official for Pilot—an "OSID" man—and stated that on one occasion he had loaded a truck for Miami when Ron John-

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[7] Johnston explained that Starling performed his duties "right on the dock," and that he would sit there and put bills in "pigeonhold," and that "each pigeonhole" determined the truck in which the freight was to be loaded.

son came by and told him the freight looked "very sloppy" and to unload the top portion and to "restack" it. Benny Boatright said that on occasions when Lane was the dock contractor, he had observed Ron Johnson "type up bills" and then tell dock people to go ahead and "load it."

Lawrence P. Crews testified that on one occasion after Lane had taken over the dock, he was dispatched with an empty trailer, but when he "hooked up" discovered the trailer had a large pipe on it, and Pilot's manager Powell then directed or instructed "two or three guys" to help them unload it. On another occasion after Lane had taken over, Pilot dispatcher Oglesbee told a BBR employee operating a towmortor to unload some rugs from a truck Crews had to bring back to the Jacksonville terminal. John Williams also gave credited testimony to the effect that he had heard Pilot foreman Levi Starling give instructions to dock employees after Lane had taken over. He said that on one occasion Starling told dock people to move freight to the rear of a truck because by loading it up front it could not be unloaded in the proper sequence for the stops involved.

From the overall considerations of this record, it is quite obvious that from time to time Pilot personnel assigned the dock work of moving freight, routine bills, loading and unloading freight, placed freight in the trailer for the most efficient operations, and further that Lane did not change any of the areas or routes previously designated by Pilot. Moreover, in the initial hiring by Lane—at least in the employ-

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ment of Brace, Johnston, and Thomas Paul Sr.—the applications were to Pilot, and there are also references in this record that when certain wage categories were established they were done so with assurances from Pilot that later on they could be redetermined. In essence, the manner of operations continued unchanged from Floyd, to BBR, to P.D.S., to Pilot, and then back to BBR, and also with some continuity of employment for key employees. As pointed out, employees of Pilot and BBR share lunch, bath and recreation facilities to the extent that it is difficult to differentiate between these employees, and, of course, control of the premises remains with Pilot. Furthermore, Pilot posted notices directed to both drivers and dockworkers. There are also clear indications in this record that a labor relations advisory firm was employed to aid with propaganda against the Union, and Pilot's dock contractors in Florida suddenly found themselves with an appointment to see an attorney, Paul Saad, of Tampa. The record is not clear as to how this meeting in February with Saad was arranged, but it is clear that Hobert Miller urged Harvey Lane to attend, and, in fact, Miller himself went to the meeting.

In the final analysis, and when viewed in the context of this entire record, it becomes clear that the present contract between Pilot and BBR does not serve to specify the actual relationships between the parties, and that in comparison to the Miami operations, as aforestated, there is a sufficient similarity in functions and controls at the Jacksonville dock so as to

bring the latter within the overall guidelines of the Board's pronouncements in its unit clarification proceeding.

8(a)(1) Allegations

It is alleges by General Counsel that Pilot and BBR engaged in numerous unfair labor practices, and it is further alleged that these unfair labor practices created such a coercive atmosphere that a free and fair election could not be held.[8]

On February 9 Regional Manager Hobert Miller found a notice posted on the bulletin board at the Jacksonville terminal which was signed by a business agent of the Union, and which openly notified the employees that the Union's organizational drive was under way. Miller then placed a telephone call to Pilot's President, Ruel Sharpe, and informed him of the notice and asked Sharpe if he would be will-

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[8] To clarify the various individual involved in this case for a better understanding, the following named person occupied the position set opposite their respective names and each is a supervisor within the meaning of Section 2(11) of the Act.

Jerrill M. Baumgarner	—Vice President of Operation—Pilot
Harvey Lane	—President, Respondent—BBR
Percy Long	—Director of Labor Relations—Pilot
Hobert Miller	—Regional Manager of Florida Region —Pilot
Raymond Miller	—Terminal Manager, Charlotte, North Carolina Terminal—Pilot
Ruel Y. Sharpe	—President of Pilot Freight Carriers, Inc.—Pilot
Leon Smith Westberry	—District Manager of Florida Region —Pilot

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ing to come to Florida to help him talk to the employees. Sharpe agreed to do so and would also bring Labor Relations Director Percy Long with him. On February 10, Sharpe, Long, and others in management flew to Jacksonville, picked up Hobert Miller and then went on to Tampa where they addressed Pilot's truckdrivers on the next morning. On the afternoon of February 11 they flew to Pilot's Hollywood terminal and met with the drivers there, and the following morning, February 12, they met with the truckdrivers working out of and at its Jacksonville terminal.

It is not disputed that the question of utilization of owner-operators under a union contract was discussed during these meetings with the employees. However, the General Counsel maintains that these meetings were an almost "panic" reaction by Pilot to the Union's open announcement of its organizational drive, and the "pervasive" nature of Pilot's efforts to destroy the Union becomes clear in that the dominant theme of the speeches by President Sharpe and Labor Relations Director Long at Miami and Jacksonville, was to clearly convey the understanding that Pilot would never even attempt to maintain an owner-operator relationship under a Teamster contract, and that if employees persisted in seeking representation, Pilot would revert back to its conventional operation.

In paragraph 12(a) of the complaint it is alleged that Pilot officials—President Ruel Sharpe and Labor Relations Director Percy Long on February 11 and

12—threatened drivers of Pilot with financial loss if they selected the Union by telling them Pilot would cease using owner-operators in the Florida Region, and would not purchase any of the trucking equipment of the employees owner-operators.

Don Croft testified that at the meeting with employees in Hollywood, Florida, on February 11, President Sharpe mentioned the recent decision by the Board in unit clarification case, and in so doing stated that Pilot would continue to treat drivers as owner-operators, but Croft then admitted that in closing his remarks Sharpe told employees that it was "really up to the men" and whatever they wanted "he would go along with it." Croft said that Percy Long spoke at this meeting on February 11, and made certain references to authorization cards.[9] Percy Long testified that at this meeting President Sharpe discussed the decision of the Board in the unit clarification decision, herein the UC case, and in relation thereto some question were asked if Pilot would do away with owner-operators, and in reply Sharpe said that he "hoped to continue the relationship that they'd had in the past," and he had no intentions of making any changes, and Sharpe further stated that Pilot had gone to a lot of expense and effort to try and protect the rights of the

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[9] Robert Curry also gave testimony for the General Counsel and said that after he has asked a question about what Pilot would do relative to the unit clarification decision—Sharpe replied that he had good relationship with his men, but he could not tell them what to do.

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people in Florida and he hoped they would exercise those rights. Long said that a question was brought up of whether or not Pilot would sign an owner-operator contract if the Union came in. Long testified that Sharpe then told the owner-operators that he was not aware of what he might do at some future date, but he did not feel that Pilot could live with the Teamster owner-operator contract as he knew it in the Southern Conference of Teamsters.

Don Croft stated that at the Jacksonville terminal on February 12, the meeting was generally the same as it was in Hollywood the day before. He said Sharpe told them Pilot would "probably" be forced to go to company equipment, but in closing again stated that "it was up to the men" to do whatever they wanted to do. Robert Miller, testifying for the General Counsel as to the meeting on February 12, stated that Percy Long and Sharpe made references once again to the Board's UC decision and in so doing said that Pilot had spent thousands of dollars fighting this case, and Pilot still felt that its drivers were independent contractors even though the Board had held otherwise. However, on cross examination Robert Miller recalled this statement by Sharpe, and specifically Miller testified:

> Q. (By Mr. Blue) . . . when the statement was made that they could not live with owner-operators, was the statement also made or was it in the context of, "we cannot live with owner-operators under the Teamster National Master Freight Agreement?'

A. (By Mr. Miller) Yes, Mrs. Sharpe's the one that said this.

Q. (By Mr. Blue) 'Cannot live with owner-operators under the Teamster National Master . . .'

A. (By Mr. Miller) No, he said he could not live with the owner-operators' contract and Master Freight Agreement by the Teamsters.

Turning to the latter part of paragraph 12(a) alleging statements on February 11 and 12 that Pilot would not purchase any of the trucking equipment. Don Croft stated that at the meeting in Jacksonville, President Sharpe told them that if they went for the Union Pilot would be forced to go to "Company equipment." Driver L. D. Crews testified that on February 12, Sharpe told drivers in Jacksonville that he was going to see "if he couldn't keep the same operation going" and wanted everyone to "still run as owner-operators." Crews said that Percy Long also talked on this occasion and told employees they would be a lot better off to stay as owner-operators rather than try to get the Union in. Crews said the drivers then asked several questions at this meeting, and in answer to a question of whether Pilot would buy the owner-operators trucks in event of the Union—Sharpe replied that he would not do so as he could not operate them under a union contract. Specifically, Crews testified as follows:

Q. (Mr. Wooten) Do you recall any other question at this time that were asked at this meeting?

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A. (Mr. Crews) Yes, sir, the same question was asked that was asked of Mr. Sharpe, if this union went in, wouldn't the company have to buy our trucks back because we were asked—I mean—well, we wasn't asked to buy them; they just told us we would have to buy them, or either we'd have to find us another job. So, we's just wondering why the company—if it went union, why they wouldn't have to buy them back, or wouldn't consider buying them back, or wouldn't consider buying them back under the Bluebook price of them.

* * * *

A. (Mr. Crews) Mr. Sharpe said that he wouldn't have to buy—wouldn't buy any truck back, so that was it, they wouldn't buy a truck back, they wouldn't have any use for them, they had plenty of truck, plenty of equipment.

Crews also stated that at this meeting some mention was made of R.C. Motor Lines in Miami running under an owner-operator contract, but this arrangement had proved unsuccessful. Elick Bell testified that at the meeting on February 12, Sharpe told drivers that in his opinion they were still owner-operators, and he would not give them an owner-operators union contract because R.C. Motors had one and could not "live with it" and he felt that Pilot couldn't live with it either. Bell stated that questions were then asked as to what would happen with the trucks owned by the owner-operators if the Union came in, and Percy Long replied to this question by stating that Pilot did not need any lease

equipment, and the drivers would have to do whatever they wanted with their trucks, but Pilot had no intentions of buying any lease equipment, and also mentioned the situation involving R.C. Motors and the fact that they had been unsuccessful in their efforts. Driver Benny Boatright also said that questions were asked about the equipment owned by drivers, and Long replied that Pilot could not live with an owner-operator contract, that they had no use for their equipment, and told them the drivers would have to dispose of their own trucks. He testified that Sharpe also spoke at this meeting on February 12, and told the drivers he would like to have them maintain an owner-operator status and that he had spent over $200,000 in payment to a law firm in fighting for their rights.

The credited evidence in this record reveals that at the meeting on February 12, Long read the Board's UC decision, and then advised employees that Pilot had spent nearly a quarter of a million dollars on this case in order to protect the driver's rights, and they felt it would be in the best interest of all to keep the Union out. He also answered questions asked of him. When asked whether Pilot would sign a union contract, Long responded by stating it was Pilot's feeling that they could not operate under a Southern Conference owner-operator union contract, and that R.C. Motors had tried it and had not been able to operate under it, and Long cited examples where some of the drivers from R.C. Motors were then leased to Pilot at their Miami terminal.

I do not believe that the statements and answers of Sharp and Long, on the dates here in question, went beyond the rights to express their views or opinions. Section 8(c) of the Act provides that the expressing of any views, arguments or opinions shall not constitute or be evidence of an unfair labor practice, if those expressions contain no threat of reprisal or force or promise of benefit. The reliable evidence shows that at these meetings Pilot officials referred to the Union notice that had been posted, and to the Board's UC decision and then indicated their desires to continue the independent contractor status regardless of the Board's decision. There was no statement made that Pilot would never sign any owner-operator labor agreement, but to the contray, several witnesses testified that their statements were directed to a specific contract—the owner-operator provisions of the Teamsters National Master Agreement or owner-operator contracts in the Southern Conference, and this reply was in response to questions asked of him. As pointed out, all that Sharpe can be accused of saying is that he could not afford an owner-operator operation under the Teamster National Master Agreement, and this is not the same as saying that he would never sign any union contract covering owner-operators. Sharpe simply stated his opinion with relation to possible economic consequences of signing the Teamster National Master Freight Agreement upon the Florida operations, and such is protected free speech under § 8(c) of the Act.

It is also clear that statements with regard to Pilot's intention not to purchase the equipment owned by owner-operators, were made in response to specific questions directed to Pilot by the owner-operators, and in one instance Sharpe replied that "no one could compel him to buy something that he wouldn't have a need for." There is considerable testimony in this record as to the value of the trucking equipment owned by the owner-operators, and estimates run as high as the $28,000 to $30,000 range. However, as pointed out, it must be recognized that each owner-operator does not own the same type and make of tractor. In fact, most of these vehicles are different and are differently equipped, but to the contrary, Pilot generally purchased automotive equipment on a long term rotation plan and approximately 200 trucks are bought at one time. All of these trucks have the same equipment, same tires and same engine, and this gives Pilot the advantage of being able to stock identical repair parts and have equipment that mechanics are trained to repair. Obviously, such would not be the case if Pilot were to purchase the tractors of the owner-operators. In the final analysis, there is no evidence in this record that statements relating to the refusal of Pilot to purchase the owner-operators' vehicles was related to antiunion motive, but must be deemed clearly permissible based on business reasons and justifications. Moreover, when considerations are given to the statements here in question, it must also be kept in mind that Sharpe con-

tinually and repeatedly informed the owner-operators at these two meetings that they could do whatever they wanted in with regard to seeking union representation and he would go along with it and even several witnesses for the General Counsel so testified, as I have detailed previously herein. I hereby recommend that the allegations contained in paragraph 12 (a) of the complaint be dismissed.

Paragraph 12(b) alleges, in part, that Pilot violated 8(a)(1) of the Act by granting over-the-road drivers an increase in the mileage rate paid for freight.

During the course of the trial it became apparent that the only wage increase granted to drivers resulted from the emergency fuel surcharge issued by the Interstate Commerce Commission, Permission No. 74-2525. The language of the surcharge itself provides:

> A surcharge of six percent (6%) subject to a one cent minimum applies in connection with all freight charges for line haul transportation and charges for other services which consume fuel, such as pick up and delivery, which are specified in this tariff.
>
> Sepcial Permission No. 74-2525 requires that the person actually responsible by contract or otherwise, for the payment of fuel charges, is to receive a full increase in revenue derived from surcharges published thereunder. . . .

Permission No. 74-2525 is dated February 7, but on February 8 the Interstate Commerce Commission

issued an amendment to Special Permission No. 74-2525. The amendment provided, *inter alia*:

> Only one surcharge as to a tariff may be in affect at any one time, and any surcharge filed under authority of this permission shall not provide for any exceptions (non-application) with respect to any particular tariff.

Pilot argues that the import of this amendment apparently repealed the 1 percent surcharge that had been issued on January 30, effective February 11, and as a result there was some confusion in the mind of Hobert Miller and other Pilot officials as to whether the fuel surcharge was a combination of 6 percent plus 1 percent (7%) or whether the surcharge was only 6 percent with the 1 percent eliminated upon the adoption of the 6 percent surcharge.[10]

It is undisputed that the increase resulting from the fuel surcharge was made retroactive by Pilot from February 11, (the ICC effective date) to February 8, and the owner-operators were informed of the fuel surcharge increase during the meetings held by Pilot on February 11 and February 12, as aforestated.

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[10] Prior to the fuel surcharge, the over-the-road drivers of Pilot made 32 cents per mile on all loads of less than 40,000 pounds, and 34 cents per mile for all loads in excess of 40,000 pounds. The 2-cent per mile increase as a result of the fuel surcharge was computed by multiplying the 6 percent (or 7 percent) surcharge by the applicable mileage rate of 32 or 34 cents per mile. In either case, the amount of the increase was computed as 2 cents per mile and the mileage rates was increased accordingly.

The General Counsel contends that Pilot announced and applied the surcharge increase in such a manner as to confer a benefit where it would do them the most good, and this was done despite the fact that no official documentation was then available to any of the Pilot speakers and had the obvious intent of cooling interest in organizational activity. The General Counsel further maintains that the disparte application of the fuel surcharge also shows illegal motivation in that road drivers, whose compensation complaint was the prime subject, were told that payment would be retroactive to February 8, and the city drivers, who had not voiced any particular complaint about fuel costs, were told that payment to them would not commence until February 18, because freight carrying the surcharge would not reach Florida until that date. Moreover, the General Counsel points out that the actual fuel surcharge authority does not directly concern any driver or owner-operator, but is merely authority for the carrier to impose an additional surcharge upon existing tariffs, and no carrier had authority to impose such surcharge prior to the effective date of February 11, and the retroactive application intentionally conferred a benefit.

This record shows that the fuel surcharge matter was only briefly mentioned and discussed at the meeting on February 11 and quite possible in response to a question, and in reply drivers were told that the surcharge matter had not been finalized, but the road drivers or contractors would receive about

2 cents a mile and the local city drivers would get the increases automatically based on the percentage of their revenue. At the meeting in Jacksonville on February 12, Long brought the surcharge matter up and gave the same general explanation as Sharpe gave the day before.

Hobert Miller explained that a new payroll period began for Pilot on February 8, and thus the retroactive period was limited to a period of 2½ days. Pilot argues that had the fuel surcharge not been made retroactive to February 8, then the first 2½ days of the payroll period would have been paid at 32 cents per mile while the remaining days in the payroll period would have been paid compensated at 34 cents per mile for all loads less than 40,000 pounds, and the same relationship for loads in excess of 40,000 pounds.

It appears to me that Pilot made no effort to indicate to the road contractors that the increase was in any way related to their union activity, but on the contrary were told that the increase resulted directly from the fuel surcharge. Thus Don Croft one of the principal General Counsel witnesses, testified:

> Mr. Miller (Hobert Miller) told us that we were going to get a two-cent a mile increase because of the fuel surcharge.

The increase here in question was not a matter within the determination of Pilot, but lay wholly within the control of the federal government. Pilot did not seek any fuel surcharge increase, but, as is

well know, the increase was sought by truckers throughout the entire country who were caught in the rapidly rising fuel cost squeeze. Furthermore, at the time the increase was announced, Pilot had not received any demand for recognition from the Union, and at the meetings on February 11 and 12 there were no announcements on the retroactive aspects of the surcharge. In the final analysis, it would be extremely difficult to find that Pilot attempted to convert a government required fuel surcharge into a rate increase for its drivers which related to the union activity of its owner-operators, and where failure to grant the increase would have placed Pilot in violation of an order of the Interstate Commerce Commission.

Paragraphs 12(b) and (d) of the complaint also alleges that on or about February 11 and 12, Pilot violated the Act by promising and granting its local city pickup and delivery drivers an increase in the minimum pay rates.[11]

The General Counsel maintains that the increase in minimum drop and pick-up charges finds no support in the language of the fuel surcharge authorization, and argues that in the case of city drivers the expenditure for fuel, the issue specifically intended by ICC Permission No. 74-2525, bears no relation-

[11] Local city pickup and delivery drivers are compensated on a revenue percentage basis. On all shipments from zero to 4,999 pounds picked up or delivered by a local city driver, he received 13 percent of the Pilot revenue. On all shipments from 5,000 pounds and up the local city pickup and delivery driver received 7 percent of Pilot revenue.

ship to work performed and constitutes a clear benefit not mandated by the surcharge order, and that the drivers contracts, providing 13 percent of Pilot's revenue would automatically contain the surcharge increase.

It appears to me this record adequately reflects that there was no change by Pilot in its 7 and 13 percent basic pay rates to city drivers other than those reflected by the government's emergency fuel surcharge, and the drivers then realized this increase because Pilot's revenue—the amount Pilot charge its customers—was increased by the 6 percent fuel surcharge. Hobert Miller explained that if a shipment would have brought in $100 prior to fuel surcharge —then, after the 6 percent fuel surcharge, Pilot's revenue would increased to $106, and applying the city driver's percentage figure of 13 percent of revenue prior to the fuel surcharge, he would have received 13 percent of $100 or $13, and after the surcharge he would have received 13 percent of $106 or $13.78. Pilot could not refuse to institute this fuel surcharge, nor could they reduce the percentage paid to city drivers, because in all likelyhood this would have been in violation of the ICC order.[12]

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[12] It is clear that the fuel surcharge was required as demonstrated by the various orders of the Interstate Commerce Commission, and it is also pointed out that in May the ICC took the position that Pilot was not in compliance with Permission No. 74-2525 by their failure to pass along the entire 6 percent surcharge (Pilot Ex. No. 14). Thus, Pilot on one hand was being charge with an unfair labor practice for passing on the 6 percent fuel surcharge, and on the other

It is also admitted that Pilot increased the minimum revenue on a local city pickup and delivery from $2 to $2.15, but again this increase was made to comply with the fuel surcharge. This increase was made effective on February 18, and there is reliable evidence this date was chosen because the local contractors' compensation is controlled by the flow of rate from the East Coast—New York area, and it apparently was Miller's judgment that the freight shipped carrying the fuel surcharge would not arrive in Florida until approximately 6 to 8 days from the time the surcharge was first added to the bills, and so the date of February 18 was chosen.

There is no showing in this record that these increases were given to discourage union activity. Hobert Miller testified that the only way he could pass the fuel surcharge onto the minimum pay rate was to increase the minimum by the 6 or 7 percent figure. It is also pointed out that the fuel surcharge specifically states that it applies to all services which consume fuel, such as pickup and delivery, and thus the question becomes did Miller act unreasonably in applying the emergency fuel surcharge figure to the minimum pickup and delivery tariff of $2 so that an antiunion motive can be imputed to his action. Pilot maintains that the answer is negative, and I am in full accordance therewith. I recommend that all the

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hand, was being threatened with possible federal prosecution for not passing on the full amount of the 6 percent fuel surcharge.

allegations contained in paragraph 12(b) and in paragraph 12(d) of the complaint be dismissed.

Paragraph 12(f) of the complaint alleges that Pilot granted an upward adjustment in the rate paid for the transfer of trailers to and from various railroad loading ramps in the Jacksonville area, and it is further alleged in this paragraph that a decision to grant other wage increases had been made but could not be given because of the labor dispute with the Union.

Evidence in this record reveal that Pilot moved from its old terminal to its current location on Ellis Road in the latter part of December, 1973. On January 24, approximately 1 month after this move and before any renewed union activity, and a few days prior to the decision of the Board in the UC case, Hobert Miller and Leon Westberry held a meeting with local city pickup and delivery drivers in Jacksonville. At this meeting local driver Denny Swain raised the matter of compensation for pulling trailers to the various railroad ramps in Jacksonville. Swain's position was that when Pilot moved to its new terminal there was an increase in distance from this terminal location to the ramp of the Florida East Coast Railroad (FEC), but, on the other hand, the Seaboard Coast Line ramp was closer to the new terminal. Swain suggested that the Seaboard run be reduced by $2.50 per trip, and that the Florida East Coast haul be increased by $2.50 per trip. The third ramp serviced by Pilot—Southern—was approximately the same distance from the new terminal as

it was from the old terminal, and there was no suggested change in the rate to the Southern ramp. Following these suggestions, the drivers were told that Pilot officials would discuss the matter and then get back to them. Swain asked again on February 7 about the changes in rates for these hauls to the railroad ramps and was told by Manager Leon Westberry that he would discuss the matter with Hobert Miller. Westberry then checked the mileage between the old terminal and the new terminal and FEC, and found that it was further to FEC from the new terminal. He also concluded that Seaboard was closer to the new terminal than to the old terminal, and as a result it was decided to reduce the compensations to Seaboard by $2.50 per trip and increase the FEC compensation by $2.50 per trip. Westberry informed Swain of these changes on the afternoon of February 8.[13]

The suggested changes in the rates to the railroad ramps were the ideas of city drivers made to Pilot in January, as aforestated, and after considerable investigating as to the actual mileage involved and another subsequent inquiry about this matter by Denny Swain on February 7, certain changes were

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[13] Both Westberry and Miller testified that the greatest number of runs were made from Pilot to Southern, but since distance were the same no change was made in the Southern compensation. In Westberry's opinion, the next greatest number of runs would be to Seaboard and with the least amount to Florida East Coast. Hobert Miller testified that there was about an equal number of runs to Florida East Coast and Seaboard.

made in the rates to two of the terminals, as previously noted herein. In view of the fact that this matter was raised by the drivers and then pursued by them on at least one other occasion, it appears to me the changes made resulted from *their* efforts and suggestion and without any illegal activity on the part of Pilot.

About the only testimony bearing on the latter allegation contained in 12(f) that a decision to grant other wage increases had been made but could not be given any effect because of the labor dispute with the union, was given by General Counsel's witness Robert Miller. He made reference to the meeting with drivers on February 12, and attributed the following two statements to Sharpe:

> 'But any other increases at this time,' that he's not at liberty to give because of the union activities that was going on.
>
> He (Sharpe) said, 'We gonna do something about that later on, but right now,' he said, 'we can't do anything because of things being tied up in this mess with the Union.'

L.D. Crews testified that at a meeting in February, Hobert Miller stated that he could not do anything about increases while union activity was going on.

No other witness called by the General Counsel said anything in their testimony about a promise of future wage increases but for union activity, and, in the final analysis, there was no testimony attributed to Pilot wherein it was stated that a decision to grant other wage increases had been made, but could not

be given any effect because of a labor dispute with the Union. Percy Long, the Pilot Director of Labor Relations who attended the group meeting of owner-operators in February, credibly stated that he had no recollection of any discussion of wage increases or possible wage increases at the meetings with the exception of the increase relating to the fuel surcharge. I shall recommend that all the allegations contained in paragraph 12(f) be dismissed.

Paragraph 12(c) alleges that on February 11 and 12 Sharpe and Miller announced to employees at the meetings that they were going to received wage increases and an upward adjustment in pay rates while also stating that Pilot would like to give further wage increases, but were unable to give more because of Pilot's labor dispute with the Union. As noted beforehand, the wage increases in question were made necessary because of the federal fuel surcharge, and there is no reliable testimony attributing coercive statements that Pilot was unable to give further increases due to the labor dispute. In accordance with the above, paragraph 12(c) is also dismissed.

Paragraph 12(e) alleges that on or about February 18 Hobert Miller told Local pickup drivers in Sarasota and Tampa that they would received an increase in minimum rates paid for the pickup and delivery of local freight. Apparently, this allegation is directed toward the establishment of the minimum rate per solid loads. *Robert* Miller testified for the General Counsel that at a meeting in Jacksonville in February, Hobert Miller made an announcement of the institution of a $30 minimum for solid load pick-

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ups and this would have been a substantial increase since the greatest amount he had ever received for a load of solid freight was $25.

The General Counsel argues that this announcement, in the middle of an organizational drive, was clearly calculated to stop the spread of card signing into other terminals of Pilot, and because of the constant contact between drivers of the various terminals in Florida, this increase would immediately become known to the Jacksonville drivers with the unmistaken implication of reward and punishment. The General Counsel further maintains that Hobert Miller's subsequent rescinding of this increase does not change its tainted existence, because he did so by notice to terminal managers and not by open announcement to employees.

Hobert Miller stated he never mentioned in any meeting held in Jacksonville any change in the minimum pickup charge for solid loads, but admitted he did discuss this matter with managers and local contractors or drivers at the Tampa, Sarasota and Miami terminals on or about February 18. However, Hobert Miller went on to say that the minimum was never paid to any contractor.

Again, as pointed out, Robert Miller is the only local or city driver for Pilot who can recall such an announcement, and neither city drivers Crews nor Boatwright recalled the subject, and I agree the reason for this is that no such announcement was ever made in Jacksonville. At the very most Hobert Miller received rumors and hearsay information from discussions which took place at terminals hundreds of

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miles from Jacksonville. I shall recommend that the allegations in paragraph 12(e) be dismissed.

Paragraph 12(g) of the complaint alleges that in the latter part of January and early part of February, Hobert Miller told unit employees to come to him with their working problems so he could get their complaints cleared up. The General Counsel points out that the meeting on January 20 with over-the-road drivers of Pilot, and the meeting on January 24 with city drivers of Pilot, as aforestated, were very unusual meetings in two respect. First, all prior attempts to arrange such meetings had been denied, and second, in the face of the impending organizational drive, Manager Miller was soliciting grievances with assurance that he would make adjustments where necessary since the road drivers were complaining about the dispatch procedure, and the priority in refueling trucks, and the city drivers were complaining about the rates being paid on transfers to the various railroad ramps, as aforestated.

Initially, it should again be noted that these two meetings in January took place prior to the receipt of the Board's unit clarification decision as that decision did not issue until January 31. In fact, the hearing in the UC cases commenced in June of 1972, and organizational efforts at Pilot had been in a more or less state of suspended animation from that date until the first of February, 1974. It should also be specifically noted that Don Croft came to Hobert Miller and asked for the meeting of January 20, and Denny Swain requested the meeting on January 24,

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and it should further be remembered that this was a period where extremely rapid fuel increases and shortages were causing considerable alarm and confusion to truckers all over the United States. Its no wonder that Miller granted the meetings with the drivers most directly effected by these conditions.

At the meeting on January 20 a question was asked as to why drivers were not allowed to fuel their own trucks. At this particular time truck attendants were fueling all vehicles—both company and owner-operator, and because of the "clocking" procedures required by ICC regulations, owner-operators lost a substantial amount of "running time" in having to wait for the attendants to fuel their trucks. As a result of these circumstances, owner-operators were then allowed to fuel their own trucks, and the self-fueling operation with a meter began on February 8. It was stipulated that the self-fueling equipment, including the meter, was ordered by Pilot before January 1. As pointed out, the problem of fueling the contractors' vehicles was in the process of correction before the Union's organizational effort was rekindled in February.

The other matters discussed at these two meetings in January included a change in the pay rates to rail ramps, as aforestated, complaints about the dispatch procedure, and the primary complaints about getting more money for the owner-operators because of their rapidly increased expenses—fuel, tires, repairs, and items of this nature.

Since these meetings in January were specifically requested by the drivers or their spokesman, and then

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only concerned or dealt with the matters raised by the drivers, and since the meetings in question were held prior to the Board's decision in the UC cases, I am unable to find any violation of the Act. I recommend that the allegations contain in paragraph 12 (g) be dismissed.

Paragraph 12(h) alleges that a letter sent by Pilot on March 6 threatened strikers with reprisals if they did not return to work. It is undisputed that Pilot sent a letter on March 6 to everyone involved in the labor dispute here in question. The letter stated:

> TO ALL PERSONS, INCLUDING EMPLOYEES, LOCAL AND ROAD-DRIVER CONTRACTORS, AND EMPLOYEES OR DOCK CONTRACTORS ASSIGNED TO THE JACKSONVILLE TERMINAL:
>
> Please be assured that Pilot Freight Carriers, Inc., will take no action against any employee, local or road driver, contractors or employee of a dock contractor who has not been working but desire to return to work.
>
> As always, we will continue to respect the rights of all person associated in any way with Pilot.

On March 3 Manager Hobert Miller received a telephone call from driver Henry Scruggs who informed Miller he had heard rumors that all contractors who were withholding services due to the strike had been fired by Pilot. Miller assured Scruggs that this was not true and testified that this call from Scruggs then prompted Pilot to contact all other striking *drivers* and inform them that they had not been

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fired. The General Counsel argues that this letter from Miller is an implied threat as it expressed to those strikers who did not immediately return less favorable treatment, and further that this is the only interpretation possible when reviewed in the light of subsequent events which took place between the alleged event that motivatd the letter and its actual dispatch some 3 days later.

Paragraph 12(i) alleges that Pilot officials made telephone calls and met with striking employees in order to solicit the employees to abandon the strike and return to work. It further alleges promises of the use of Pilot equipment at no cost, and promises to permit double runs were also made to owner-operators if they would abandon the strike.

It is undisputed that for a short interval striking owner-operators were permitted to utilize Pilot equipment free of charge when some of them initially returned from the strike if they desired to do so, and it is also undisputed that double runs were permitted upon returning to work from the strike. However, in order to make a complete assessment of these allegations, all the surrounding circumstances must again be considered.

One of the factors that should be taken into account when evaluating these allegations, was the actual fear of the returning owner-operators to utilize their own tractors, and to drive alone or single at a time when the strike was officially still in effect, and these fears of strike related damage and retaliations were clearly the motivation considerations in offering

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and granting the changes of operations here in question, and the use of Pilot equipment was permitted if the owner-operator involved was afraid of damage to his own tractor, but in the alternative Hobert Miller also told owner-operators that they could use their own equipment and in such cases Pilot would then responsible for any strike-related damage.[14]

There is some testimony in this record by owner-operators to the effect that the use of Pilot equipment without charge "double their income" or "substantially" increased their income. As pointed out, it must be remembered that Pilot did not furnish the fuel for the Pilot vehicles. All the fuel involved was furnished by the owner-operators. Furthermore, a few weeks after some of the striking drivers had returned, a fee of 5 cents per mile was then charged for the use of a Pilot tractor, but owner-operators were still required to supply the fuel.

Owner-operator W.B. Rowan, a witness for the General Counsel, tried to explain how the use of Pilot equipment "doubled" his income. First, Rowan mentioned fuel. However, whether driving Pilot equipment or his own, he paid for the fuel. Next he mentioned tires and tractor maintenance. Admittedly, there is the cost saving of tire wear and tractor maintenance by driving Pilot equipment. However, by Rowan's own figures, the savings came to perhaps 5 or 6 cents per mile, at most, and this is the amount that Pilot started charging owner-operators to use

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[14] It must also be recognized that at this time the strike at Jacksonville was being supported by other Teamsters' locals.

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Pilot equipment a few weeks later. Others costs mentioned by Rowan were such fixed costs as depreciation, insurance, initial cost of his tractor, and down payments. However, whether he drove his truck or a Pilot tractor, there is no impact on these costs. Don Croft stated that when he returned from the strike he chose to use company equipment because it would save wear and tear on his own equipment, but when Pilot started charging 5 cents per mile for the use of Pilot's equipment, Croft cease using Pilot's equipment and began using his own tractor.

Immediately after Hobert Miller received the call from Henry Scruggs on March 3, as aforestated, he then made telephone calls to all the other drivers of Pilot who were on strike to inform them that work was available as he had freight to move, and told them they were welcome to return if they desired to do so, and on March 5 Hobert Miller also called a meeting of striking drivers at a nearby Ramada Inn. Miller explained that "lots of rumors were floating around" and he wanted drivers to know that Pilot had work for them. At this meeting on March 5, driver Jack Lumly asked Miller what consideration could be given to contractors "teaming up and running double." Lumly also stated that he had a previous injury and because of it could not drive continuously for more than 3 or 4 hours without taking a break, and that this presented a problem to him because union drivers from other carriers would come along and harass him. Lumly stated that he had already experienced this harassment on previous trips. Following these state-

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ments one of the drivers at the meeting asked about placing a guard on a truck with the driver. Miller replied and informed the owner-operators that a guard was too expensive, but in the alternative, if contractors desired to team up and ride together, he would agree to these arrangements. Double runs were then permitted for a period of approximately 10 days at 50 cents per mile (25 cents per mile per driver) compared with the normal 34 or 36 cents per mile for the driver on a single operation.

On March 7 another meeting was held at the Ramada Inn as driver Ray Geiger had asked Hobert Miller to talk to other road contractors who were interested in returning. After certain questions were asked by the drivers as to their coming back, Miller assured them there would be no retaliations, that he had freight to move, and he would welcome them back. Ray Geiger then asked Miller if he could drive a Pilot truck if he returned because he was afraid to drive his own due to possible damage to it. Miller replied that Pilot would pay for broken windows and other damages resulting from strike activity if they drove their own equipment.[15]

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[15] Manager Hobert Miller recalls conversations taking place on this subject matter in these meetings with drivers. He testified:

> I don't know—someone in the meeting asked about driving Pilot equipment, stating that the reason he was concerned—or had any interest in driving Pilot equipment was that he was concerned about the safety of his own equipment and would like to drive Pilot equipment for

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It appears to me that in the instant case the solicitation by Hobert Miller were within "noncoercive" guidelines. First of all I am in agreement that the letter sent out by Pilot on March 6, as set forth previously herein, informing all concerned that there would be no action taken if they desired to return to work, cannot be considered as an implied threat. As pointed out, this is particularly true when the last sentence of the letter states that Pilot would continue to respect the rights of "all persons associated in any way with Pilot," and, moreover, there are absolutely no indications in this letter that any adverse actions would be taken against those who did not return.

The owner-operators returning from the strike might have temporarily made a little more money operating Pilot's tractors and driving double, but these

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the reason that fear that his equipment would be damaged.

General Counsel witness Robert Young, in response to a question about using Pilot equipment, testified as follows:

> No, only when Mr. Miller [Pilot Regional Manager] told us that we could drive company equipment if we were afraid that our equipment would be damaged as strike result, but if we drive our equipment and it was damaged in any type way, strike-related, that the company would take care of all repairs.

Similarly, Robert Miller, another General Counsel witness, testified:

> Yes, Mr. Cooper [Pilot's Safety Director] said that, 'You guys can come on back to work and, like Mr. Miller, say, it hasn't been permitted in the past, you can—if you fear for your own tractor, you can . . . you don't have to drive it, you can use company equipment. . . .'

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basic arrangements and offers were made at the owner-operators' requests because of their real fear in driving their *own* tractors, and these same apprehensions were further exemplified in their request to run double, as aforestated. This is not a situation were the employer specifically advised strikers that they would receive special and enumerated benefits on returning, but, in essence, were arrangements whereby drivers could use company equipment so their own tractors would not be damaged by other strikers, and also have personal protection and safety by running double, and these considerations triggered such arrangements. If the owner-operators received any indirect or temporary economic benefits, they can be readily attributed to the difficulties related to and created by the strike, and potential property and personal damages flowing therefrom. Certainly, the law does not require an employer, in the midst of a strike, to compute to a "finite degree" the possible financial benefit to an employee who wants to come back. I recommend that the allegations contained in paragraph 12(h) and all the allegations in paragraph 12(i), be dismissed.[16]

Paragraph 12(j) alleges that on March 3, Jerril Bumgarner threatened the Union's pickets who were engaged in peaceful picketing at Pilot's terminal in Charlotte, North Carolina. Mose Brown testified that Jerril Bumgarner was the Pilot official who made this threat, but Jerril Bumgarner established that he was

[16] During the trial subsection (4) of paragraph 12(i) was striken from the complaint.

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not in the Charlotte area during the period alleged in the complaint, and when Mose Brown was later asked to observe Jerril Bumgarner, he admitted that he was not the man involved. The General Counsel then stated that he intended to amend the complaint when identity was established, and on the last day of the trial, August 2, moved to amend, and I denied the motion mainly on the grounds of untimeliness. Jerril Bumgarner testified on July 24 that he was not Bumgarner involved in the incident at Charlotte, and, therefore, it appears there was ample opportunity to present the amendment much earlier in the trial rather then waiting until the very last possible moment. It seems to me that such practices must be vigorously discouraged as it places undue burden on most everyone concerned, and under some circumstances can be highly prejudicial. The prosecution should know its full case prior to resting and most certainly before the opposition has rested its defense. I recommend that paragraph 12(j) be dismissed.

Paragraph 12(k) alleges that on or about March 3, *Raymond Miller*, Pilot's terminal manager at Charlotte, summoned the police to search the pickets at the terminal, and in so doing created the impression that he had called police to search employees engaged in peaceful picketing.

Raymond Miller arrived at the Charlotte terminal about 3 a.m. on March 4, and observed a car bearing Virginia license plates parked on the property of Ranch House Restaurant, a business located adjacent to the terminal, and Miller did not recognize either

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the car or the people in it. Miller saw no picketing at this time, and said that there had been no picketing at the Charlotte terminal prior to this incident. Miller further testified that the Ranch House Restaurant had experienced several robberies and other incidents over the past several years, and as a result there was an agreement between Pilot and the Ranch House that they would report suspicious people, and, therefore, he immediately called the local police. Union Representative Henry Baker and Mose Brown stated that a picket line had been established on Sunday, March 3, and Baker placed Manager Raymond Miller at the scene around 11 p.m. the night of March 3, where he supposedly was trying to persuade dockworkers to cross the picket line. However, the important factual issue for my consideration is Miller's testimony that he did not see any picketing when he arrived at the terminal in the early morning hours of March 4, but only observed a strange car in the adjacent Ranch House parking lot with men sitting in it. In their testimony the pickets admitted that from time to time during these early hours, they were sitting in the car with the out of state license plates, and would only come out of their car when they saw the lights on other vehicles approaching.

In the final analysis, this records shows that Raymond Miller did not see any picketing in progress when he drove up—at least two men were setting in a foreign car at a very unusual hour—and the car was parked on nearby property where there had been serious difficulties in the past. From these circum-

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stances there is little to suggest or indicate that the police were called to harass pickets, but in the alternative it appears that the police were called because there was a suspicious looking car parked on the Ranch House property, and calling the police under these circumstances does not constitute a violation of the Act.[17] I also recommend that this allegation be dismissed.

Paragraph 12(1) alleges that on or about January 26, Harvey Lane of BBR, threatened dock employees with loss of their jobs at Pilot's Jacksonville terminal, by stating that if the Union organized the terminal he (BBR) would lose the dock contract. I agree there is no reliable evidence in this record to support this allegation, but T.J. Paul came probably the closest to approaching the subject when he stated that in February, Lane told him that since a 30-day period was involved (in employment contracts) he could terminate people and hire in a new crew "if it were to come up to a strike," as he would have to move Pilot's freight, and then further told Paul "that if we were to vote for the union and a strike was to come up that it could put him out of business, which, in a sense, it could." These statements were expressions by Lane all hinging on what could happen in event of a strike, and must be deemed privileged. It is recommend that this allegation be dismissed.

Paragraph 12(m) of the complaint alleges that on or about February 1, Harvey Lane informed an em-

[17] Upon arrival the police merely conducted a routine investigation and then immediately left the area.

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ployee that Pilot's President, Ruel Y. Sharpe, was prepared to spend 10 million dollars to keep the Union from organizing the employees in Florida. The only employee testifying to such a conversation was Melvynn Johnston, and he also said that Lane made this statement to him both before and after BBR became the dock contractor. Lane denied ever telling anyone that R.Y. Sharpe would spend 10 million dollars to keep the Union from organizing the employees, but admitted telling dock employees at Jacksonville that Sharpe had spend, as he recalled a quarter of a million dollars in legal fees, and this was the extent of his statement with regard to money or to be spent by Sharpe.

As pointed out, in *Cosco Product Co.*, 123 NLRB 766, 776, an employee testified that the plant superintendent told him that the president of the company was a "determined man," that he was determined not to have a union, and that he would "spend a lot of money to keep the union out." There was no finding that the above statement was violative of the Act, and the statement made by Lane as to what Sharpe had spent in legal fees is substantially similar to the above quoted statement from *Cosco*—a statement that was not found to be illegal. It is recommended that this allegation be dismissed.

Paragraphs 12(n)(o) and (p) of the complaint alleges that on various dates in February, Lane interrogated employees concerning their union activities, told his employees that the 10 thousand dollars he was

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spending for attorney fees to fight the Union was money that otherwise would be in their paycheck, that he could not afford union wages and if the dockworkers were organized they would be looking for another job, and further told the employees they were all on probation and hurting themselves by signing cards. It is also alleges that Lane put into effect a rule prohibiting union solicitation except on break or at lunchtime.

It is admitted that Lane had a number of conversations and meetings with his employees, but it is argued that some of the conversations took place when Lane was a driver for Pilot, that on other occasions employees themselves initiated the conversations, and at other times there was a lot of "joking" going on.

There is credited testimony in this record by T. J. Paul, Sr. to the effect that on or about February 7, Harvey Lane asked Paul if he knew or had heard anything about the signing of union cards and the ruling by the Board, and Lane also told him he had heard Paul was passing out authorization cards. Paul testified that during the middle of February he went out to the union hall in Jacksonville for a specific reason, and upon returning or within a few days thereof, Lane asked him why he had done so and also inquired what he had heard, and on one of these occasions the conversation was concluded when Lane reminded Paul that his BBR dock employees "worked there for 30 days" on a probationary period

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and he could terminate them and hire a new crew in the event of a strike.[18]

Curtis MacDowell testified as to a meeting Lane conducted on February 8, and credibly testified that at this meeting with about 25 dock employees present, Lane told the gathering there was union talk on the dock and he was "awful disappointed" in them, reminded the employees that some had signed union cards and it was not "very nice" of them, also reminded dockworkers that some were in a probationary period and were only "cutting" their "own throats" by signing union cards, said that there was no way the Union would come in as Sharpe was spending "X" amount of dollars, and near the end of the meeting Lane told employees that if he or any dock supervisor observed any employees talking about the Union, passing or signing union cards on work time, they would be fired immediately. MacDowell said that at this meeting Lane also referred from time to time to a paper he had in his hand and especially so when he mentioned what he could do in event of a strike.[19] Lane further told his employees that he knew who had not signed cards, that the Union did not like "casual help" but those that wanted to work in event of a strike could do so

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[18] BBR application blanks filled in at the time of employment made reference to the right of management to terminate employees within 30 days without recourse.

[19] It is admitted that at this meeting Lane reference to a written inter-office correspondence dated February 7 from Hobert Miller. She Respondent Pilot Exhibit No. 19.

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because Pilot would not "let anything happen" to them.

In several respects Mose Brown corroborated the testimony of MacDowell as to what was said by Lane at his meeting with dockworkers on February 8, but Brown also testified that Lane told them he had paid out $10,000 for a lawyer and he could have divided up this amount among the employees.[20]

The foregoing testimony which has been credibly attributed to Lane or the Respondents as joint employers, included illegal instances of interrogations about union activities—asking Paul why he had gone to the union hall, and inquiries about the passing and signing of authorization cards. These interrogations by Lane were unlawful inasmuch as the information elicited by him could serve no legitimate purpose, and provided no assurances of any kind against reprisals. It is without need of citation that an employer's threat to discharge employees because of their membership in or activities on behalf of a union is violation of Section 8(a)(1) of the Act, and, as pointed out, there can be no clearer violation than Lane's statements at a meeting of employees in reference to probationary employees being terminated or "cutting their own throats" because of their card signing activity on behalf of the Union. Fur-

[20] Melvynn Johnston testified that he had had extensive conversations with Lane about each other's views toward unions prior to the time that Lane became the dock contractor. At the time of these conversations Lane was an owner-operator (non-supervisor) for Pilot and Johnston was a dock employee.

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thermore, I find that on this occasion Lane also orally promulgated an illegal or overly broad no-solicitation rule, as his sudden announcement on this matter only prohibited *union* activities on worktime and it was specifically so stated. No employee was prohibited from any kind of conversations or solicitations during worktime, and from the nature of the open informality at the dock on many other occasions, as duly reflected in this record and by the demeanor of Lane himself, I think it safe to assume there were continuous discussions and other activities going on while the dockworkers were performing their jobs, and, of course, there were no restrictions of any kind against these activities. The talking and discussion about union matters and authorization cards were the only things admonished. *Ling Products Company, Inc.*, 212 NLRB No. 38.[21]

The 8(a)(3) Allegations

It is alleged that on February 7, the Respondents, as joint employers, discriminatorily discharged BBR employees Roy Brace, and Melvynn Johnston.

In late January Pilot's terminal manager in Jacksonville, Jerry Gilliam, told Brace that if he wanted to continue working he should go to Lane's office and fill out an application, Brace did so and within

[21] Lane had every right to spend as much money for a lawyer or for legal fees as he so desired, and whether or not any savings or reductions of cost in these respects would or would not be included in the employee paychecks, is strictly speculative and within the sole control of management. I recommend that subparagraph (1) of paragraph (o) be dismissed.

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a few days commenced working for BBR switching trucks on the second shift—from 3 p.m. to 11:30 p.m. At the time Brace was hired as a switcher, Lane mentioned to him the pending UC case, and, according to Brace, told him he hoped the decision would not give the Union the right to organize or it would put both he and Brace out of a job.

On February 6 Melvynn Johnston informed Brace of the decision by the Board in the UC case, and asked Brace to sign an authorization card which he then did. Brace testified that one day later, February 7, he came to work at 3 p.m. and at approximately 7:30 that evening had completed refueling trucks and clocked out for supper. He said that as he did so Harvey Lane followed him out to his car and then informed him that he could pick up his time in the morning. When Brace asked for the reason Lane responded that the didn't owe him any G— D— reason, and he did not have to give one. Later that same night, February 7, Brace called Johnston and they discussed their situations and Johnston then suggested to Brace that he return to the dock and solicit some of the other employees and to meet them after work. Shortly after midnight, February 8, Johnston and Brace met with several other dock employees at a parking lot where additional authorization cards were obtained.

Lane's recollection of the discharge is substantially different. Lane testified that he went to the terminal around 6:30 or 7 on the evening of February 7. He stated he went into the dispatch room to check the

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board showing the number of trailers in the yard yet to be worked, and said that Pilot dispatchers were "raising cane" about switchers being behind in hooking up the units. Lane stated that upon receiving this complaint he notice that Brace was leaning against the timeclock with his timecard in his hand. Lane testified he then took a stack of switch tickets to help clear the congestion and headed toward the timeclock, but when he reached the clock area Brace noticed the switch tickets in his hand and told Lane, "Don't hand those goddam things to me. Give them to Sam. I'm going to supper," and then punched his timecard and walked toward the front of the building. Lane testified he gave the switch tickets to another switcher and followed Brace outside and as soon as he got to the car he told Brace, "Roy, it's not working out, and I just as soon you didn't come back after you finished supper," and that, according to Lane, was the extent of the conversation.

Melvynn Johnston had worked previously for Pilot as a switcher, but on January 27 started his employment as a switcher for BBR at the Jacksonville terminal. Johnston testified that on February 4 he heard about the decision by the Board in the UC case, and on the next morning he went to the union hall in Jacksonville to discuss the decision with Business Agent Jim Wheeler. On February 5 Johnston signed his authorization card and was also given additional cards to be signed by others, and in the next few days Johnston was able to get the signatures of 17 dock employees—14 of them on or by February 7.

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At 11 p.m. on February 6, Johnston reported for his regular shift, and worked until about 2:30 a.m. on the morning of February 7 when he took sick and had to go home. Johnston testified that on the evening of February 7, about 8 o'clock p.m., Lane called him and inquired as to his health, and then told him there would be no use for him to come to work because he was fired. When Johnston asked why, Lane replied, "You know more about what's going on around here than I do."

The Respondents maintain that the discharge of Brace set into motion the events which lead to the eventual discharge of Johnston. Brace was a switcher on the 3 to 11:30 evening shift, and Johnston was a switcher on the 11 p.m. to 7:30 a.m. shift, and when Lane discharged Brace he had to have a switcher come in to take Brace's place. According to Lane, since Johnston was one of the switchers who would report for the next shift, he called Johnston and asked him to come in early.

Lane testified that Johnston had been a constant source of complaint from Pilot dispatchers, and also that T. J. Paul had complained about Johnston's work, and as a result of these complaints he had reassigned Johnston to a dock switcher and had put Paul up front with the dispatchers. There is further testimony by Lane to the effect that following this reassignment, Lane's dock supervisor on the midnight shift became upset with Johnston because he could never find him, but Lane suggested to his supervisor that he assign Johnston to "strip trailers"

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whenever this work was needed, and then Johnston would have something to do when he had finished switching trailers and would not be as likely to disappear. Lane testified that on the night of February 6 he had a discussion with his dock supervisor regarding Johnston's work in the trailers, and his supervisor told him he had put Johnston in a trailer over Johnston's protest, and on the night in question Johnston had reported sick and had gone home.

Lane testified that on the evening of February 7, following the discharge of Brace, he called Johnston and asked him how he was doing, knowing that he had been sick the night before, and Johnston told him that working in the trailer had made him sick. According to Lane he then asked Johnston to come in early because he was short of switchers, but Johnston would not answer him one way or the other as to whether he would come in early, and after an argument over whether he would or would not report, Lane finally said: "Just don't bother to come in. I can't get an answer; just don't bother to come in." In response to this, Lane testified that Johnston told him he would be in at 11 o'clock, his regular reporting time. Lane said he then informed Johnston that it would not do him any good and that he was pulling his timecard.

The Respondents contend that Brace and Johnston were discharged for cause based on the reasons as outlined in Lane's testimony, and further that there is lacking any evidence to indicate that Lane knew or had any reason to know of any union activity

BLEED THROUGH

on the part of Roy Brace, nor was Brace involved in the solicitations of any authorization cards. Admittedly, the Respondents agree that Johnston was acitvely engaged in solicitation of authorization cards on behalf of the Union, but maintain there is no evidence that Lane was aware of this solicitation.

Prior to his termination there is no testimony whatsoever that Brace was involved in the solicitation of authorization cards and his name did not even appear as a witness on any of the cards. His only activity for the Union *before* the discharge was the signing of his own card, and there is no substantial evidence in this record to show that Lane was ever aware of this fact. It is recommended that the allegation pertaining to Roy Brace be dismissed.

In the case of Johnston the initial consideration, of course, is whether Lane had knowledge of his union activity prior to the discharge, and on the basis of this record as a whole, I conclude that Lane had such knowledge. Lane knew Johnston before the events in question here, and admitted that in December, 1973, Johnston was already complaining about working conditions at the Jacksonville terminal, and at that time specifically told Lane that he was "just waiting" for the Union to come in. On or about February 1, Lane and Johnston had another union conversation, and other testimony in this record makes it clear that Lane knew who were circulating and getting the cards signed. Lane was fully aware that Johnston was a strong union adherent.

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On the day Johnston was terminated, February 7, Pilot was also holding a series of small group meetings at the Jacksonville terminal. Pilot's District Manager Leon Westberry testified that at these meetings on February 7, he read a memo from Manager Hobert Miller (Pilot's Exhibit No. 19) to the various groups of drivers meeting with him, and wherein it is stated, *inter alia*, "We fully expect that the Teamsters will now go out and try to sign up Pilot's contractors and employees of the various dock contractors * * * We suggest that the dock contractors consider very carefully any attempt by the Union to sign up their employees." Westberry offered in support of this testimony a list of drivers he had meetings with, and the list indicated 15 drivers by name who attended sessions on February 7, and a review of the names of people attending the sessions on February 7 included H. Lane. It would appear to me that these meetings with Westberry on February 7, set the stage for a rapid survey by Lane of his situation, and the hunt for the union leader on the dock was underway. On the night of February 7 employee Thomas J. Paul, employed by BBR as a switcher on the 11 p.m. to 7 a.m. shift, reported for work and was advised by Lane that Johnston had been let go. Lane then asked Paul what he had heard about this dispute and signing of Union cards and the ruling, as aforestated. Lane also advised Paul that someone had said that he was passing out Union cards, but Paul said it was a lie and he had not even signed a card.

BLEED THROUGH

Mose Brown, another switcher at BBR, testified concerning a conversation he had with Lane on the afternoon of February 7, and wherein Brown was accused of passing out Union cards. Brown denied that he had anything to do with Union cards.[22]

Lane also admits receiving a copy of the memo or letter from Hobert Miller dated February 7 (Pilot's Exhibit No. 19), but states he had no knowledge of the contents as he did not read the letter until he got to his home on the evening of February 8. However, Westberry had referred and read this letter when Lane was among those who attended the small meetings, as aforestated.

Lane's testimony relative to the complaints he had previously received about Johnston and the basis for his transfer to other jobs and related difficulties, may help establish the sequence of events leading up to the circumstances surrounding the discharge, but are not the assigned reason for firing him and, therefore, are of little or no importance here. Lane testified that he decided on the discharge because he was unable to get a definite commitment from Johnston on his request to come in early when he called him on the evening of February 7. However, the credited testimony by Johnston established that when Lane called he first inquired about his health as he

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[22] Brown further testified concerning a conversation between himself and Lane which took place a few day after Johnston was fired, and wherein Lane told Brown that he was going to have to go to Court over the firing of Johnston and Brace. Lane said he would tell him why he fired Brace, but he would not tell anyone why he fired Johnston.

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had gone home sick the night before, but then finally told Johnston the reason he had called was to tell him there was no reason for him to come in that night. Johnston asked if there had been a layoff or something, and Lane said, "No, I'm firing you." Johnston asked why, and Lane replied, "You know more about it than I do." Johnston said, "I don't understand Harvey, what are you talking about." Lane said, "Just what I said, you know more about what's going on around here than I do." I considered these remarks by Lane as at least an indirect inference that he was terminating Johnston because of his union activity. There is no credited evidence that Lane asked Johnston to report early as he did no even mention to him that Brace had been fired.

I am in agreement that the sequence of events surrounding the discharge of Johnston points to an inescapable conclusion that the termination was rooted in discriminatory considerations. As argued this is the only apparent explanation that is fairly inferable from the evidence adverted to above, and the inference is bolstered by the timing of the discharges, a highly significant factor in ascertaining the true motive for a dismissal under these circumstances. Discriminatory motivation may, indeed generally must, be inferred from circumstantial evidence such as the timing of the discharges. *N.L.R.B.* v. *Melrose Processing Co.*, 351 F. 2d 693, 698 (C.A. 8); *N.L.R.B.* v. *Superior Sales, Inc.*, 366 F. 2d 229, 233-234 (C.A. 8). As had been said, "the abruptness of a discharge and its timing are per-

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suasive as to motivation." *N.L.R.B.* v. *Montgomery Ward & Co.*, 242 F. 2d 497, 502 (C.A. 2), cert denied, 355 U.S. 829; *N.L.R.B.* v. *Dorn's Transportation Co.*, 325 F. 2d 360, 366 (C.A. 6). Here a leading Union activist was summarily discharged almost immediately after he had secured authorization cards and such a discharge would manifestly be an effective means for discouraging union membership and defeating the organizing campaign. *N.L.R.B.* v. *Tepper*, 297 F. 2d 280, 282-284 (C.A. 10); *N.L.R.B.* v. *Sitton Tank*, 467 F. 2d 1371-1372 (C.A. 8); *N.L.R.B.* v. *Tak Trak, Inc.*, 293 F. 2d 270-271 (C.A. 9).

A charge was filed in Case No. 12-CA-6384 alleging that Pilot violated Section 8(a)(1), (3) and (4) of the Act by refusing to permit contract driver Don Croft to use company equipment while his vehicle was being repaired, and it was further alleged that the refusal was in retalization for Croft's giving of testimony adverse to Pilot.[23]

On May 7 Croft overturned his truck as he was on his way to Jacksonville from Miami.[24] Croft sustained only minor cuts in the accident, but did break his glasses. On the next day Hobert Miller stopped

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[23] This is in reference to his testimony in the 10-J proceeding in Federal Court on May 16 and 17.

[24] It is recognized that Croft was an active supported of the Union and between February 10 and 12 solicited signatures on approximately 18 authorization cards, but he was also one of the first road drivers to abandon the strike and return to work.

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by the scene of the accident, and during the course of their conversation told Croft that "something" could be worked out with a company truck while his was being fixed. Miller apparently expected to hear from Croft within a few days thereafter, but it was not until June before Croft requested a company truck.[25]

Croft testified that he next stopped by the Pilot terminal in Jacksonville on May 31 and talked with a fellow driver Ed Boyer. Boyer was leaving with a load to Tampa and suggested that Croft go with him as the dispatcher had another load ready. Boyer and Croft were then dispatched to Tampa with Pilot equipment. Upon his return to Jacksonville early the next morning, June 1, Croft asked the dispatcher to put Boyer and his name on the dispatch board to go out again and the dispatcher replied, "sure, you're on the board." On Sunday afternoon, June 2, Croft went to the Jacksonville terminal and inquired why he had not been called and the dispatcher then told Croft he had been taken off the board as Pilot needed six trucks in the city on Monday morning so there were no trucks to spare. However, at this time both W. R. Geiger and Manager Westberry were loading company equipment to drive to Tampa, but the truck Geiger was to drive developed mechanical trouble and Westberry then

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[25] On or about May 16, Croft went to the Jacksonville terminal and was then asked by a Pilot supervisor to make a run with a company truck, but admittedly informed Terminal Manager Gilliam that he could not drive without his glasses.

turned the truck he was to drive over to Geiger.[26] Croft testified that earlier in the day George Martin had pulled a load to Tampa and maintained that this is the load he should have been assigned to as he was on the dispatch board ahead of Martin. He said that Westberry could not tell him why he had been taken off the board, but on Monday morning Hobert Miller advised him that Pilot had to change their policy about furnishing company equipment to owner-operators.

On May 31 Manager Westberry sent a memo to all road dispatchers stating that he had to have six company tractors in Jacksonville for city operations beginning Monday, June 3,[27] and when Croft reported to the dispatcher on June 2, he was told by the dispatcher that trucks were needed in the city on the next morning and that he could not use one, as aforestated.

This record reveals testimony showing that May and June are the peak months of the year for the movement of certain produce in the Jacksonville area, and for this purpose Pilot had an agreement with Abele Chauffeur Leasing Service to provide Pilot with drivers. On May 29 or May 30 Abele sent drivers to Pilot in accordance with the agreement, but Pilot did not have any equipment for

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[26] Later the dispatcher called Donald Cannon, another contractor, to take the other load to Tampa, and Cannon arrived at the terminal and utilizing his own tractor pulled the trailer to Tampa.

[27] Pilot's Exhibit No. 27.

them to drive as the Company tractors were being used by the road contractors, and Pilot had to send the drivers back to Abele without using them. Westberry and Hobert Miller then discussed this entire matter with people at Abele on or about May 31, and made arrangements to the effect that Pilot would guarantee 8 hours a day when Abele supplied men, and upon making these arrangements Pilot had to be sure there would be tractors available, and as a result Westberry circulated his memo to road dispatchers and Hobert Miller followed this up with another memorandum dated June 3.[28] It appears that at the time Miller wrote his memorandum he had no knowledge of Croft's effort to utilize company equipment on the preceding weekend.

As pointed out, following the memo issued by Miller, vehicles belonging to other owner-operators were also out of service for one reason or another. Specifically, tractors belonging to Donald Cannon, Henry Scruggs, and Pierce Hyman, and as a result they requested the use of Pilot equipment to make road runs, but in each instance their requests were denied. Miller also offered Croft the opportunity to operate out of their terminal at Kernersville, but Croft declined to do so. It is also noted that when Croft could not use a company truck, he leased one from BBR, and drove it for the next several weeks and had no complaints about failure to get loads or be dispatched. His only complaint was that he did not receive a check from Pilot. However, Miller

[28] Pilot's Exhibit No. 40.

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explained that it is standard Pilot procedure to make the check out to the *owner* of the truck (in this case BBR) and the owner of the truck then pays the driver. As pointed out, Croft went 3 weeks without contacting Pilot following his accident, and prior to the time he requested a company truck, the decision had already been made that Pilot tractors would no longer be made available to owner-operators. He was then offered an opportunity to run out of Kernersville, North Carolina, but refused, and then leased a truck from BBR and drove it without any problems for a period of 30 days. I find there is insufficient eivdence in this record to sustain the allegations pertaining to Croft, and recommend their dismissal.

Section 8(a)(5) Allegations

It is alleged that the appropriate unit consists of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of, or at Respondent Pilot's Jacksonville, Florida, terminal, including regular part-time employees, but excluding casual employees, coordinators, officer clerical employees, guards and supervisors as defined in the Act.

There are a total of 135 names appearing on a list of employees which shows *all* the dockmen and *all* the drivers involved in this controversy, and this figure of 135 is the maximum number of people who could be in the unit. Out of this number the General

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Counsel maintains there are 127 in the unit, the Union argues there are 118, and the Respondents contends there are 131 employees in the unit.[29]

Turning first to the eight individuals specifically enumerated by the Respondents to be included on unit as regular part-time employees.[30] A review of Joint Exhibit No. 1 shows a pattern of hours which fluctuates considerably for each of these individuals during weekly pay periods in February. For the week of February 2, only six of the eight employees worked more than 10 hours, and for the week of February 16, only four of the eight worked more than 10 hours.

In essence, most or all of those people claimed by the Respondents to be added to the unit as regular part-time employees, were scheduled to work based on the hours of their availability, but, as Harvey

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[29] On the list submitted to me there appears the names of 52 drivers in the unit, agreed to by all the parties, and the names of 73 dockworkers. Of these 73, the Union claims 9 did not attain sufficient regularity of employment to meet the standard of regular-part-time employees, and the Union objects to the failure to list two additional as included in the unit. Of the 52 + 73 + 2 = 127 listed, the Union would subtract 9 casuals, leaving 118 in the unit. The General Counsel on the basis that a worker who works as much as 5 hours per week should be included, sees 127 in the unit. The Respondents would inflate the unit by adding to the 125 figure the names of employees Bradford, Hutton, Kirkland, Robertson, Strickland, Hinson, Newman and Harvey E. Lane—son of the president of BBR, less than two Pilot claims should be excluded—for a total of 131.

[30] At least a few of these employees are apparently Navy personnel who only work for BBR during their off-hours.

BLEED THROUGH

Lane admitted, "If they weren't needed they were sent home." I find that all such individuals are casual employees and excluded from the unit,[31] and that the unit complement on February 13 was 118 employees.[32]

I also find that on or by February 13, the date of the demand for recognition, the Union was in possession of 68 valid authorization cards designating the Union as the employees' bargaining agent,[33] and had a clear majority of those in an appropriate unit.

A letter dated February 13 requesting recognition was hand delivered to the Pilot terminal in Jacksonville on February 14, but acceptance was refused. However, that evening Business Manager Wheeler, by certified mail, sent a copy of the original recognition demand and a note of explanation to Pilot. By letter dated February 18, Pilot responded to the demand by asserting a good faith doubt as to majority, requested more information as to the unit, and mentioned that an election might be agreeable so that the claim of majority status could be determined in this manner. By letter dated February 21 the

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[31] Butler, Copeland, Fullman, Markley, Myers, Roland, Shaw, and Thormberry, were also either Navy people or full-time employees of the city of Jacksonville and essentially only working for BBR when they were needed and had very irregular hours. Donald Williams was a school boy working for BBR after school hours 3 or 4 days a week. These individuals must also be considered as casual and excluded from the unit.

[32] See Appendix A attached hereto.

[33] See Appendix B attached hereto.

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Union notified Pilot that it was seeking recognition for drivers and dock employees at Jacksonville, that the request for recognition was supported by signed authorization of over 90 percent in the Jacksonville unit, that the Union would tender the signed cards, and the letter also invited the immediate check of the cards. This letter of February 21 was also hand delivered to Pilot's Regional Manager Hobert Miller along with the authorization cards by Wheeler, but Miller refused to accept the cards, and by messenger service returned the cards to Business Agent Wheeler. By letter dated February 22 Hobert Miller informed Wheeler he had returned the cards, and again asserted a good faith doubt as to majority.

The Respondents contend that the *testimony* by Business Agent Wheeler reveals that the demand for recognition was based on a total of 90 full-time employees, and, therefore, his demand did not include part-time employees. It is the position of Pilot that any unit which include full-time employees of BBR must necessarily also include part-time employees.[34]

The controlling factors here are the statements in the demand letter itself, and not Wheeler's subsequent testimony. The demand letter of February 13 addressed to Pilot, does not mention anything about part-time employees but stated that "an overwhelming majority of your employees working for

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[34] It is argued that there was 52 full-time Pilot owner-operators and since Wheeler testified as to 90 employees—this means the demand included only 38 employees of BBR.

FLEET THROUGH

your Company at Jacksonville, Florida location" have chosen the Union as their bargaining agent.

It appears to me that even though the unit was somewhat ambiguous in the initial demand letter—this request was sufficient to support a duty to bargain. It is well settled that a union's request for recognition is sufficient to raise a duty to bargain on the part of an employer if the employer is apprised in general terms of the proposed unit description. The request need not be grammatically perfect and need not defined the unit in minute detail, and the request is sufficient if it describes any appropriate unit, it need not describe the most appropriate unit. It is also noted that further particulars as to the unit make-up was supplied by the Union in response to Pilot's letter of February 18. I find that the Union made a sufficient demand for recognition.

The Strike

As earlier discussed, the strike commenced on February 25, and through the credited testimony of Business Agent Wheeler resulted because of the discharges, as aforestated, and because of the refusal to recognize and bargain with the Union.

While there is lacking any corroborating testimony as to the reason for the strike, it obviously resulted or was manifestly caused and prolonged by the above conduct, and, therefore, in view of my findings here, must be deemed an unfair-labor-practice strike as

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alleged in the complaint.[35] The strikers, of course, who have not already returned to work, have an absolute right to reinstatement upon Respondents being properly notified of their readiness to return, but as far as I can ascertain by this record no offer to return the strikers has yet been given.[36]

In one of its affirmative defenses Pilot contends that the Union discriminates against minorities under the

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[35] When it is reasonable to infer from the record as a whole that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike. *Juniata Packing Company,* 182 NLRB 934 (1970).

[36] To complete the sequence of events—by telegram dated March 6, Pilot demanded that the Union direct the strikers to return and disavow the strike, and that Local 512 process any grievances through applicable steps in the grievance procedures contained in bargaining agreements between Pilot and the Teamsters. Wheeler then went to the terminal to discuss the contents of the telegrams but was told that Hobert Miller would not see him "under any conditions." By notice from Hobert Miller dated March 19 to dock employees and drivers, Pilot took steps to disavow the alleged unfair labor practices of BBR. See Pilot's Exhibit No. 35 (a) and (b). I agree that Pilot's belated posting of this notice will not cure the violative conduct. Such posting of notice occurred long after the unfair labor practices and several weeks after the strike started. At the time of the initial request for recognition and again on February 21, Respondents were given opportunities by the Union to check the signatures on each authorization card, but failed to do so, and even beforehand had countered union activities with discriminatory conduct, as aforestated. To find that this violative activity could be cured by the mere posting of the notice in question would be in complete disregard for the remedial provisions and relief afforded by the Act.

principle of the *Mansion House* case.[37] More specifically, that Teamsters Local 512 is a party to one or more bargaining agreements, including the National Master Freight Agreement, which operates to deprive members of minority races of equal employment opportunity in violation of the Civil Rights Act of 1964, and labor organizations who engaged in racial discrimination are not entitled to the benefit of the remedial machinery of the National Labor Relations Act.

Briefly stated, the holding of the Court of Appeals in the *Mansion House* case was that a union which discriminates in its admission policies on the basis of race is not entitled to the benefits of an National Labor Relations Board remedial order.

Since the court decision in *Mansion House*, the Board has had a few opportunities to consider this matter. In *Hawkins Construction Company*, 210 NLRB No. 152, Administrative Judge Jerrold Shapiro found that the employer violated Section 8(a)(5) by refusing to furnish information to the union. The employer pleaded the *Mansion House* defense and after carefully weighing the evidence, Judge Shapiro concluded that the "statistical disparity between the racial composition of the Union's membership with that of the general population was not demonstrated to have been readily identifiable as substantial." In short, the *prima facie* case of discrimination had not been proven. The Board adopted his recommended

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[37] *N.L.R.B.* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (CA. 8, 1973).

order, agreeing that the evidence does not establish a *prima facie* case of racial discrimination by the union.

Again in another case, the Board adopted an order recommended by Judge Charles Schneider finding violations of Section 8(a)(5) despite an affirmative defense that the union engaged in racially discriminatory practices. Judge Schneider found that the failure of the union to refer minority employees to the employer was insufficient to establish that the union engaged in racial discrimination. The evidence showed that the union had referred minority persons to other employers, that it had substantially increased its minority membership in the past few years, and participated in various programs for recruitment and training of minority individuals. The Board agreed with the Judge's disposition of the case on the merits.[38]

In *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB No. 7, a majority of the Board determined that the question whether the Board should certify a union which engaged in invidious discrimination of this type raised constitutional issues, and that the Board lacked the power to confer a certificate on such a union. In *Bekins*, the Board did not set forth specific parameters which would be determinative of particular cases. However it did say:

> It will thus be our task, on a case-by-case basis, to determine whether the nature and *quantum* of the proof offered sufficiently shows a propensity for unfair representation as to require us, in order that our own action may conform to our

[38] *Williams Enterprises Inc.*, 212 NLRB No. 132.

constitutional duties, to take the drastic step of declining to certify a labor organization which has demonstrated in an election that it is the choice of the majority of employees. It is not our intention to take such a step lightly or incautiously, nor to regard every possible alleged violation of Title VII, for example, as grounds for refusing to issue a certificate. There will doubtless be cases in which we will conclude that correction of such statutory violations is best left to the expertise of other agencies or to remedial orders less draconian than the total withholding of representative status. To reconcile these views with a full awareness of our own constitutional responsibilities will, we recognize, not always be an easy task, but the difficulties involved do not entitle us to shrug off our oath to uphold and defend the Constitution of the United States.[39]

Since *Bekins* has determined that the issue of whether a union discriminates upon the basis of race, sex, or national origin raises constitutional questions, and consideration of these issues is warranted prior to granting a bargaining order. However the Board cautioned that it would not take lightly the step of declining to certify a union, and that it would not regard every alleged violation of Title VII as grounds for refusal to certify. It declared these matters will be considered on a case-by-case basis.

In the instant case it is specifically argued that the National Master Freight Agreement negotiated by the

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[39] See also *Bell & Howell Co.*, 213 NLRB No. 79, and *Grants Furniture Plaza, Inc. of West Beach, Fla.*, 213 NLRB No. 80.

International Brotherhood of Teamster (Joint Exhibit 2(a), 2(b), 2(c) and 2(d) and signed by many Teamsters locals throughout the country, including Local 512), has created situations which perpetuate the effects of prior discrimination via seniority provisions in the trucking industry, and Pilot also cites several court decisions in support of his argument. It is my duty, of course, to follow the Board decision until the matter in issue is either adopted by the Board or considered by the Supreme Court.

In essence, Pilot is contending in the instant case that racial discrimination arises due to the fact that separate contracts are maintained for both local and over-the-road drivers, and in order for a local driver to move to an over-the-road driver category paying more money, he must give up all seniority and move to the bottom of the seniority list in the over-the-road category.

Pilot offered no evidence in support of its affirmative defense, and there is no independent proof in this record of any kind to show evidence of discrimination against drivers, blacks, women, or any other group. Whether local drivers have even any desire to become over-the-road drivers is merely speculative, and there is no evidence whatsoever of any statistical disparity between transfers of drivers nor, in fact, is there any statistical evidence in this record that any of the minority races are deprived of equal employment even in their initial employment. There is certainly no showing that minority employees were ever referred for over-the-road jobs, and even the fact that local

drivers must give up all their seniority in moving to an over-the-road category, does not establish a discriminatory policy. There is absolutely nothing in this record to show that this policy, even if carried out, is not equally applied to everyone, nor is there any evidence that one race, or one sex, or one group were ever given any priorities over any body or anyone else in any search or transfer to any job. Accordingly the *Mansion House* defense of Pilot must be rejected as being totally without support.

Conclusions of Law

1. Pilot and BBR, the Respondents herein, are joint-employers.

2. The Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. By coercively interrogating employees as to their union activities and desires, threatening discharges, and promulgating an invalid rule prohibiting solicitations for the Union, the Respondents have interfered with, restrained and coerced its employees in the exercise of their rights guaranteed to them by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

5. By discriminating against Melvynn Johnston because of his union activities, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. By refusing to bargain with the Union, on and after February 13, 1974, when the Union represented a majority of the employees in the appropriate unit described herein, Respondents have engaged in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

7. The strike is an unfair labor practice strike.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It has been found that Respondents unlawfully terminated Melvynn Johnston on February 7, 1974. It will therefore be recommended that Respondents offer him immediate and full reinstatement to his former position, or if such position no longer exists to a substantially equivalent position, and without prejudice to his rights and privileges, and to make him whole for any loss of earnings he may have suffered as a result of the discrimination against him by payment of a sum equal to that which he would normally have earned, absent the discrimination, from the date of the discrimination to the date of Respondents' offer of reinstatement, with backpay and interest computed in accordance with the Board's established stand-

ards.[40] It will be further recommended that Respondents preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records, and reports and all other records necessary and useful to determine the amount of backpay and the right to all reinstatements under the terms of these recommendations.

I have also found that the strike which commenced on February 25, 1974, was an unfair labor practice strike, and I will therefore further recommend that 5 days following their unconditional application to return to work, the Respondents offer the strikers who have not yet been reemployed immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and discharging, if necessary, any replacements in order to provide work for such strikers.

The Respondents contend that even if a bargaining order should be considered in this case it would be unjustified as they have not engaged in unfair labor practices of such an egregious and pervasive nature so as to rule out a fair election. I disagree and find otherwise.

An employer need not recognize a union solely because that union asserts that it represents a majority of the employer's employees, and may insist on a Board election unless it has agreed to an alternate means for resolving the question concerning repre-

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[40] *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

sentation, or has engaged in misconduct which is of such a character as to have a "lingering and distorting effect on any future election." *Mike Velys, Sr., et al d/b/a R. & M. Electric Supply Co.*, 200 NLRB No. 59. There is no contention that an agreed upon method was present in the instant case. As to employer unfair labor practices that warrant a refusal to bargain finding or a bargaining order, the criteria to be applied is set forth by the United States Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). In that case the high court held that a bargaining order would be appropriate in two situations. The first is in the case of "outrageous" and "pervasive" unfair labor practices where the employer's action are so coercive that, even in the absence of a Section 8(a)(5) violation, a bargaining order is necessary to repair the unlawful effect of those actions. The second is: ". . . in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." The court also held: ". . . An Employer can insist on a secret ballot election, unless, in the words of the Board, 'he engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.' " In *Ship Shape Maintenance Co., Inc.*, 189 NLRB 395, enf. den. in part 474 F.2d 434 (C.A. D.C., 1972), the Board expressed the test to be applied in terms of whether the lingering effects of the unfair labor practices rendered uncertain the possibility that traditional remedies could ensure a fair elec-

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tion, and whether the union's majority card designations obtained before the unfair labor practices provided a more reliable test of the employees' desire and better protected employee rights than would an election. As stated in *Joseph J. Lachniet, d/b/a Honda of Haslett*, 201 NLRB No. 128, where a coercive atmosphere is created by the employer which conventional Board remedies may not adequately dissipate so that a fair election can be held with reasonable certainty, a bargaining order is warranted.

Almost immediately after been appraised of the Board's election in the UC case on January 31, the Respondents launched a rather extensive campaign interfering with the exercise of the rights guaranteed by Section 7 of the Act. In early February, Harvey Lane questioned employees to ascertain facts about the circulation and signing of authorization cards, and in private conversations and in meetings with dock employees threatened discharges of probationary employees for signing cards, and on or about February 8 Lane also suddenly announced an illegal no-solicitation rule with immediate terminations if employees were caught passing or signing union cards. Moreover, on February 7, Lane discriminatorily discharged Melvynn Johnston, one of the prime instigators and leaders for the Union, and the dock employee mainly responsible for the distribution of authorization cards.

It appears to me that the unfair labor practices of the Respondents are both pervasive and outrageous and cannot be rectified by traditional remedies. In addition, it is clear that the whole course of conduct

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of Respondents were initiated and implemented to undermine the Union, destroy it majority status, and to impede the conduct of any free election. Both postulates of the *Gissel* doctrine are met, and a bargaining order is clearly appropriate.

Because the issue in this case is whether a bargaining order should be granted as a remedy for the extensive unfair labor practices as set forth and discussed above, I have concluded, for reasons stated by the Board in its decision in *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974), and related cases issued subsequent thereto, that it is unnecessary to determine whether Section 8(a)(5) has also been violated. Accordingly, I hereby dismiss the 8(a)(5) allegations of the complaint.

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[41]

ORDER

Respondents, Pilot Freight Carriers, Inc., and BBR of Florida, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

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[41] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

(a) Interrogating its employees about their union activities.

(b) Threatening employees with discharges because of their union activities.

(c) Announcing and enforcing a rule prohibiting solicitations for the Union.

(d) Discouraging membership in the Union, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in regard to their hire and tenure of employment or any term or condition of employment.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make whole Melvynn Johnston in the manner set forth in the section entitled "The Remedy," for any loss of earnings suffered by reason of the discrimination against him.

(b) Reinstate the unfair labor practices strikers as provided in "The Remedy."

(c) Upon request, recognize and bargain with Truck Drivers, Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in a unit of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of or at Pilot Jacksonville, Florida,

terminal, including regular part-time employees, but excluding casual employees, coordinators, office clerical employees, guards and supervisors as defined by the Act, respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its terminal in Jacksonville, Florida, copies of the attached notice marked "Appendix."[42] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by a representative of Respondents, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places, where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 12, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

---

[42] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C.

/s/ Phil Saunders
PHIL SAUNDERS
Administrative Judge

APPENDIX A

Name	Classification of Those in Unit
Alderman, Milton	Road Driver
Allen, Daniel	City Driver
Anderson, Emory	Dockman
Anderson, Michael E.	Dockman
Atkins, F. O.	Driver
Bailey	Dockman
Barnes, William D.	Road Driver
Bell, Elick C.	City Driver
Berger, John C.	Dockman
Bird, Frank Ed	City Driver
Black, John J.	Road Driver
Boatright, Benny R.	City Driver
Boyce	Dockman
Boyer, E.	Driver
Brace, Clarence Roy, Jr.	Dockman
Bradt	Dockman
Brooks	Dockman
Brown, Mose	Dockman
Browning, Woodrow	Road Driver
Brabham, Lewis M.	City Driver
Bryant, Virgil	City Driver
Bryant, Willie H.	Road Driver
Call, Robert H.	Dockman
Campbell, J. Patrick	Dockman
Canady, George	City Driver
Cannon, Donald	Road Driver
Cerdenio, Clarence	City Driver
Crews, L. David, Jr.	Dockman
Crews, Lawrence D.	City Driver
Cribb, James Earl	Dockman
Croft, Donald	Road Driver
Curry, Robert	Road Driver
Davis, James Edward	Road Driver
Dicks, Boston	Road Driver
Doub, John H.	Road Driver
Dougherty, Samuel	Dockman
Durbec, Steve	Dockman
Eakin	Dockman
Elliott	Dockman
Fetterman	Dockman

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Flint, Brian D.	Dockman
Floyd, Phillip N.	City Driver
Forney, Jr.	Dockman
Fulford, Forrest S.	Dockman
Gregory, Jackson, W.	Dockman
Garner	Dockman
Geiger, W. R.	Road Driver
Green, Jr.	Dockman
Gunnam, Jerome T.	Dockman
Hamilton	Dockman
Harrell, Sandy Jr.	Road Driver
Heath, S. J.	Road Driver
Higgs	Dockman
Holdsworth, Fred M.	Dockman
Horne, Longwell	Road Driver
Houston, Frank	Road Driver
Hyman, Pierce M.	Road Driver
Jessie, Haaron	City Driver
Johns	Dockman
Johnson, Willis	Dockman
Johnston, Melvin	Dockman
Johnston, Melvynn	Dockman
Jordon, Albert A.	Road Driver
Kerse	Dockman
Keye, J. Jr.	Driver
Lightfoot, Robert L. Sr.	Road Driver
Love, Michael G.	Dockman
Lowery, W. C.	Driver
Lumley, B. L.	Road Driver
Lumley, J. C.	Driver
MacDowell, Curtis L.	Dockman
McCasall, Jackie	Dockman
McDonald, James E. Sr.	Dockman
McGurer	Dockman
Martin, George G.	Road Driver
Miller Robert L.	City Driver
Multon, Freddie J.	Dockman
Murray	Dockman
Myers, John H.	Dockman
Partee	Dockman
Paul, Thomas J.	Dockman
Phillips	Dockman
Plocar	Dockman
Price, Lloyd G.	Dockman
Pruden	Dockman
Roberts, Delmar	Dockman
Roberts, Johnnie	Dockman
Roberts, Roger	Dockman

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APPENDIX A—Continued

Name	Classification of Those in Unit
Rowan, Charles E.	Road Driver
Rowan, W. B.	Road Driver
Sauls, J. R.	Road Driver
Schuetz	Dockman
Scruggs, Henry	Road Driver
Spause, P. E.	Driver
Shaggs	Dockman
Solomon, Jerome	Dockman
Stelter	Dockman
Sznakowski, William R.	Dockman
Swain, Denny Ray	City Driver
Tapley	Dockman
Tew, H. W.	Driver
Thomas, Arthur	Dockman
Thornton, Billy M.	City Driver
Tucker, James	Road Driver
Turner	Dockman
Tyson, Robert M.	Dockman
Vincent	Dockman
Weltzbarker, Carlton W.	Road Driver
White, Jr., Isiah	Dockman
Williams, Frank	Dockman
Williams, John C.	City Driver
Williams, William L.	City Driver
Williams, Willie	Dockman
Williamson, E. H.	Driver
Wilson, Errol C.	Dockman
Woolery	Dockman
Worsley, Wayne R.	Dockman
Young, Robert O.	Road Driver

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APPENDIX B

Name
Milton Alderman
Daniel Allen
William Barnes
Elick Bell
John Berger
John Black
Frank Bird
Roy Brace
Benny Boatright
Most Brown
Woodrow Browning
Lewis Brabham
Virgil Bryant
Willie Bryant
Robert Call
George Canady
Donald Cannon

Name
Clarence Cerdenio
Lawrence D. Crews
James Cribb
Donald Croft
Robert Curry
James Davis
Boston Dicks
John Doub
Samuel Dougherty
W. R. Geiger
Forrest Fulford
Phillip Floyd
Jerome Gumman
Fred Holdsworth
S. J. Heath
Frank Houston
Longwell Horne

Name
Pierce Hyman
Haron Jessie
Willie Johnson
Melvin Johnston
Melvynn Johnston
Albert Jordon
Michael Love
Barney Lumley
Curtis MacDowell
George Martin
Jackie McCasall
James McDonald, Sr.
Robert Miller
Freddie Multon
John Myers
Lloyd Price
Charles Rowan

Name
W. B. Rowan
J. R. Sauls
Henry Scruggs
Jerome Solomon
Paul Spause
W. R. Sznakowski
Denny Swain
Dennis Thornberry
Billy Thornton
James Tucker
Robert Tyson
Carlton Weltzbarker
John Williams
William L. Williams
E. C. Wilson
Wayne Worsley
Robert Young

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT question employees about their union activities.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT make, announce, or enforce any rule which prohibits only union solicitations.

WE WILL NOT discharge or otherwise discriminate in regard to the hire and tenure of employment or any term or condition of employment of our employees because of their membership in and activities on behalf of the Union herein or of any other labor organization of their choice.

WE WILL offer to MELVYNN JOHNSTON his former job or if such job no longer exists, to substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL pay him for any loss of pay he may have suffered by reason of our discrimination against him together with interest thereon.

WE WILL reinstate the strikers not already working upon their application to return to work.

BLEED THROUGH

WE WILL bargain collectively with the Union respecting rates of pay, wages, hours, or other terms and conditions of employment, as the representative of our employees in the bargaining unit set forth herein.

PILOT FREIGHT CARRIERS, INC.
(Employer)

BBR OF FLORIDA, INC.
(Employer)

Dated ———— By ————————
(Representative) (Title)

Dated ———— By ————————
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602 (Tel. No. 813-228-2641).

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APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 10. (h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * *

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia)

within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: • • •

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 211918 183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1059

HAROLD A. ROSE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner

vs.

PILOT FREIGHT CARRIERS, INC., ET AL,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

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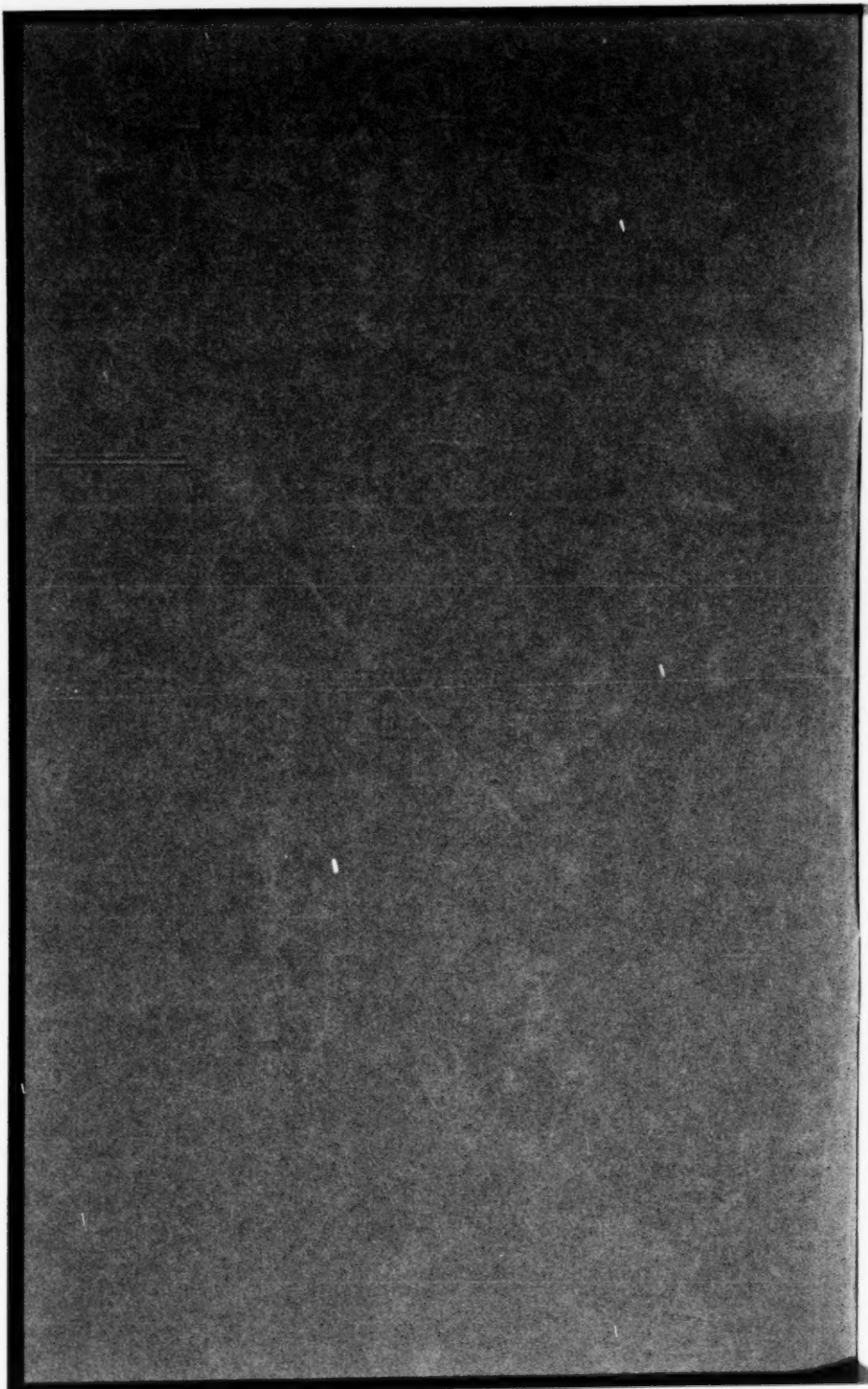

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1000

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

PILOT FREIGHT CARRIERS, INC., ET AL,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

A. The Question Which The Petition Seeks To Present To This Court Is Moot

The question presented here, as framed by the Petitioner, is whether the District Court should have issued an "interim bargaining order" because of the existence of an employment atmosphere which would "preclude the holding of a fair" union representation election.

That issue does not presently exist in this controversy — and has not existed during the last year and a half — because it was resolved in August 1974, when Pilot Freight Carriers, Inc. ("Pilot" or the "Company") and Truck Drivers Local Union No. 512, affiliated with the International Brotherhood of Teamsters (the "Union") entered into a strike settlement agreement which rendered a District Court-imposed "interim bargaining order" totally unnecessary, even if it be assumed *arguendo* that the Court had authority to issue such an order.

The chronology of events was as follows. On various dates in February 1974, Pilot officials were alleged to have violated the Labor Act at the Company's Jacksonville, Florida, terminal by making threatening and coercive statements to employees during an organizational campaign which had just begun. Additional allegations of a similar nature were made against Pilot in March.

On May 13, 1974, the Board petitioned the District Court for interim injunctive relief against Pilot in Jacksonville pending a hearing and decision by the Board on these allegations. The District Court scheduled a hearing for May 16, 1974. The Board claimed such an urgent need for an injunction that it opposed even a brief continuance in order to allow Pilot's lead counsel to be present. The proceedings before the District Court on May 16 can best be described as an *ex parte* hearing, because, although the Board was allowed to present live evidence through witnesses, that opportunity was denied the Company. Pilot was forced to submit its defense in the form of affidavits and exhibits.

On June 28, 1974, the District Court entered an injunction restraining Pilot in significant respects — primarily upon the Board's allegations which Pilot had been denied an effective opportunity to rebut. The Court did not, however, order the Company to engage in interim bargaining. At that point, therefore, the questions of recognition and bargaining were still unresolved.

This situation did not continue long, however. On August 15, 1974, Pilot and the Teamsters Union signed an agreement which established a method of resolving the question of recognition for the dockworkers at the Jacksonville terminal, and, as to owner-operator drivers, that is, the local and road drivers — established the hours of work, rates of pay, and other terms and conditions of their employment (See Appendix D to the Petition, and Appendix A to this Brief).

This agreement eliminated any continuing questions about the "election atmosphere", for no election was necessary thereafter. All questions of whether the passage of time pending Board decisions would make the Board's remedies "impotent" became moot. No judicial remedies were needed in order to insure a fair resolution of representation questions — because the parties agreed to their own private method of resolution of these questions.

Whatever is considered to have been the "status quo" in May 1974, which the Board at that time was contending needed to be preserved, that status was changed by agreement of the parties in August 1974. Thus, if this Court should now direct the District Court to attempt to reconstruct the status quo of May 1974, it would be destroying

the vitally important agreement which established a different status acceptable to all of the concerned parties. There is no need for an interim bargaining order to preserve the status quo while the Board decides questions pertaining to recognition and bargaining. A mutually satisfactory method of resolving those problems was agreed upon by these parties long ago.

The whole thrust of the Petition erroneously assumes that "the employer's continued refusal to bargain with the Union pending the outcome of the unfair labor practice proceeding" requires an "interim" bargaining order. But this entirely overlooks the fact of the August 1974 agreement which effectively ended the employer's refusal to deal with the Union with respect to the Jacksonville terminal, and established procedures for resolving the problems between the Company and the Union on a basis acceptable to all interested parties.

Tacitly recognizing that this agreement substantially destroys its contention in support of a continuing need for an "interim bargaining order", the Board falls back on an utterly fallacious argument, which in plain terms is to the effect that it did not want the bargaining to come out the way it did — that is, the Board did not approve of the substance of the agreement reached by the parties. For the Petition asserts, albeit by footnote, that what the Board wants is an "interim" order which would make "both" Pilot and BBR recognize the Union as the representative of a "combined unit" of drivers and dockworkers.

The highly contrived nature of this argument is apparent at once. The Labor Board is not authorized to approve,

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veto, or alter labor agreements. Here, the parties agreed to have one resolution as to the dockworkers and another for the drivers. This is traditional in the unionized trucking industry, and it would be the height of absurdity for the agreement of the parties to be cast aside on the theory that the bargaining units should not have been separated through such agreement. There is no public policy which would prevent the parties from agreeing upon separate units. In hundreds of representation cases, the Board has approved or ordered such a division of units.

The argument that the contract should be disregarded because it was only between Pilot and the Union, and did not include BBR, is similarly as absurd. In the first place, the Union and the Board have from the very beginning contended that BBR is merely a paper corporation, and that Pilot is the real employer. The Union was satisfied with a contract signed only by Pilot, and it is not proper for the Board to seek by way of injunction, the addition of another party to that agreement. Furthermore, the Board has found that Pilot was to be considered the employer, or at least a joint employer, of the dockworkers. The Petitioner cannot properly be permitted to pursue totally inconsistent courses — on the one hand claiming BBR is to be ignored, and on the other claiming that the contract is deficient for not including BBR.

Thus, when placed in its true factual context, the only controversy that the Board can realistically contend exists here is whether the District Court should have entered an "interim bargaining order" requiring "both" Pilot and BBR to bargain with the Union for a "combined" unit of

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drivers and dockworkers. This is not an issue or controversy which exists between the parties. It is purely and simply an issue manufactured by the Board in its struggle to find — or create — some controversy in this case where none actually exists.

The inescapable fact is that this artificial "controversy" does not exist; and if it did, it could not be resolved in any event by an injunctive order which would destroy the agreement arrived at by the parties through the very process which a court-enforced bargaining order is theoretically designed to encourage.

Precisely the same issue here involved was presented to this Court in *McLeod v. General Electric Company*, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967). In that case, the District Court and the Court of Appeals differed regarding the proper standard which should be applied in any request for an injunctive order under Section 10(j) affirmatively requiring "interim bargaining". However, after the Court of Appeals decision, the parties made an agreement, and in light of this supervening event, this Court said, "The controversy over the proper standard for injunctive relief is immaterial if such relief is now improper whichever standard is applied." 385 U. S. at 535, 17 L. Ed. 2d at 590.

In that case, this Court remanded the action with directions that the District Court determine in the first instance what effect this supervening event should be deemed to have had on the appropriateness of injunctive relief. It should be noted, however, that the District Court had *granted* an injunction requiring interim bargaining. In the

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instant case, both the District Court and the Court of Appeals agreed that a mandatory injunction was inappropriate. The subsequent agreement between the parties is all the more reason for concluding that a remand for further consideration of the question by the District Court is not only unnecessary, but actually improper.

B. No Conflict In the Circuits Exists In This Matter

The Petition has asserted that the question here involved is whether the District Court "has authority" to issue an interim bargaining order. This is clearly not the case. The real question which was at issue before the District Court was whether it had authority to issue, *or to refrain from issuing*, a bargaining order in light of the facts before it. The Board is necessarily contending here that this Court should strip the District Court of any discretion in this regard — and should force the District Court to issue an interim bargaining order. This is clearly not the presentation of facts — "facts" which later turned out to be substantially erroneous. No court has done that, nor is it expected that any would do that, and there is no conflict in the Circuits about the matter.

The statute itself decrees that the District Court should issue an injunction only in circumstances where it would be "just and proper." This necessarily means that under certain factual circumstances an interim bargaining order would not be just and proper. This Court's decision in *McLeod v. General Electric Company*, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967), shows that discretion

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rests initially in the District Court to decide "upon the appropriateness of injunctive relief."

The test stated by the District Court and the Court of Appeals in the instant case was "whether injunctive relief is equitably necessary, or, in the words of the statute, 'just and proper' " (3a).[1] The Court of Appeals recognized that this test of "equitable necessity" confers a "certain range of discretion upon the trial court, reviewable for abuse" (12a). The Court said "some measure of equitable principles come into play here" and "if the trial court, in its discretion, does not believe that far-reaching mandatory relief would serve the purposes of the Act, it need not grant the full remedy requested by the Board. The Chancellor does not abdicate his powers merely upon a showing that the Regional Director's theories surpass frivolity." The Court below cited and relied upon *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d 1230 (2nd Cir. 1974) in support of this proposition — where it was said that the District Court "maintains some power to do equity and mold each decree to the necessities of the case" (14a).

The District Court in the instant case granted some of the injunctive relief requested by the Board, but did not command interim bargaining. The only basis on which this decision, at the time of its issuance, could have been challenged for its refusal to direct "interim bargaining", was that the employer might have been allowed to avoid bar-

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[1]Unless otherwise specified, references are to the Petition and the Appendices thereto.

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gaining for so long a period that, by the time the Board completed its procedures to compel bargaining, the result could have been rendered meaningless because of an intervening erosion of union strength. However, none of that happened here, since bargaining was voluntarily begun and an agreement was reached two months after the District Court's ruling. The whole issue then became moot. The subsequent events proved the District Court was correct in declining to force bargaining on the record before it. Furthermore, the Fifth Circuit was fully justified in its doubt "that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover" (18a). In light of subsequent events, the non-bargaining status only continued for two months after the District Court ruled and the method of resolving the recognition questions had already been agreed upon at the time of the Court of Appeals decision.

There is nothing to indicate that the Second Circuit would have reached a different result based on the facts in this case. In *McLeod v. General Electric Company*, 366 F. 2d 847 (2nd Cir. 1966), the standard applied by the Second Circuit was whether the Board had demonstrated that an injunction was necessary, under the facts of that particular case, "to prevent irreparable harm." In the instant case, the Fifth Circuit said that the District Court was within its discretion to find that in the absence of interim bargaining the Union would suffer no harm from which it could not recover (18a). There is nothing to indicate that the Second Circuit would have ruled otherwise if this case, with its facts, had been brought before that Court.

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Also in *McLeod,* the Second Circuit stressed the "extraordinary nature" of the injunctive remedy in the labor field. It recognized that the entire scheme of the National Labor Relations Act envisaged a system where the Board would, in the first instance, consider and decide issues arising under the Act. The Court evidenced the need to be "ever mindful of the dangers inherent in conducting labor management relations by way of injunction." *McLeod v. General Electric Company,* 366 F. 2d at 849-850. Its holding was that:

> "We are not convinced that the facts in the present case reveal those special circumstances which must be present before a court will intervene and issue an injunction prior to the Board's hearing and decision. The Board has not demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm. . . . It would be more in keeping with the scheme intended by Congress to have this case, particularly because of its unusual characteristics, follow the path of Board hearing and decision on the unfair labor practice charges, rather than to shortcircuit the established administrative design. . . ."
>
> *McLeod v. General Electric Company,*
> 366 F. 2d at 850

The same issue was before the Second Circuit in *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d 1230 (2nd Cir. 1974). In that case, the Court squarely rested the determination of the appropriateness of injunctive relief in the District Court, upon the particular facts and circumstances before it.

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"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."

Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F. 2d at 1241

The Court quoted from Justice Douglas' classic opinion in *Hecht Company v. Bowles,* 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944) that:

"A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

Hecht Company v. Bowles, 321 U. S. at 329, 88 L. Ed. at 760

The Court in *Danielson* went on to say:

"This court has previously held that a district court should apply general equitable criteria when the Board seeks an injunction under §10(j). McLeod v. General Electric Co., 366 F. 2d 847 (2 Cir. 1966), vacated as moot, 385 U. S. 533, 87 S. Ct. 637, 17 L. Ed. 2d 588 (1967)...."

Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F. 2d at 1242

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The opinion of the Court was that the Board's position would take away that discretion and, in effect, require a "complete judicial abdication by the district court." *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F. 2d at 1230. This position, of course, was not accepted by the Court.

The case of *Seeler v. Trading Port, Inc.,* 517 F. 2d 33 (2nd Cir. 1975), is not inconsistent with the above, nor is it in conflict with the decision in the instant case.

First, it must be considered that the issue before the District Court in *Seeler* was in a substantially different posture than in the instant case. In *Seeler,* the adversary hearings before the Board's Administrative Law Judge had already been completed. All the evidence had been adduced and the defendant had been given a forum for effectively presenting its defense. Thus the District Court had before it a fully developed transcript and evidence — "the parties stipulated that the record of the hearings before the Administrative Law Judge was complete and no other evidence was necessary." 517 F. 2d at 36. Just the opposite was true in the instant case. Not only was the record incomplete, Pilot was not even allowed to present its witnesses. When finally, months later, it had an opportunity to present its evidence before the Board, the charges directed against Pilot officials were dismissed.

In the *Seeler* case, because of the complete and full record, there was "no doubt" that the employer had engaged in an "extensive campaign of serious and persuasive unfair labor practices" which, unless checked, would "rend-

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er totally ineffective" the "Board's adjudicatory machinery." 517 F. 2d at 37-39. The Court could clearly see on that record that the employer's conduct, unless enjoined, might "undermine majority strength and impede the election processes." 517 F. 2d at 37. Accordingly, the Court concluded that "under these circumstances," "further delay may make such bargaining impossible in the future." 517 F. 2d at 39.

All that *Seeler* held is that the District Court "has the power" to order immediate bargaining when it, the District Court, finds factual circumstances that such an order is necessary "to prevent irreparable harm to the union's position" and to prevent such harm to the "adjudicatory machinery of the NLRB, and to the policy of the Act in favor of the free selection of collective bargaining representatives." 517 F. 2d at 39.

The Fifth Circuit — given those conditions — would probably not disagree. In fact, the *Seeler* opinion cites the Fifth Circuit's *Boire v. IBT* decision[1] as precedent for its ruling. See *Seeler v. Trading Port, Inc.*, 517 F. 2d at 39.

In the instant case, no irreparable harm to the Union's position resulted. No harm to the Board's adjudicatory machinery occurred. The policy of the Act to allow the free selection of representatives cannot be said to have been violated, because the Union and the Company agreed

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[1]*Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 479 F. 2d 778 (5th Cir. 1973).

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upon a method of selection which was well within the realm of public policy considerations.

The circumstances faced by the Fifth Circuit in the instant case did not convince the Court that irreparable harm would result or that the Board's remedies would be frustrated. This later proved to be a correct view of the facts. Had the Court been faced with a more severe situation where there was, in the words of the Second Circuit, "no doubt" about irreparable harm to the Union, to the Board's remedial processes, and to Labor Act policy, the Court, in light of the *Boire* case, probably would have agreed with the Second Circuit that the District Court "ha[d] the power to order immediate bargaining." See *Seeler v. Trading Port, Inc.*, 517 F. 2d at 39; *Boire v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 479 F. 2d at 778.

Obviously this Court should not grant certiorari to allow a general debate regarding the power of the District Courts to grant injunctions for interlocutory bargaining. That question necessarily must be resolved upon the special factual considerations existing in each case. In the instant case, the factual controversies have been settled. The issue, therefore, necessarily would be presented hypothetically — which prevents a meaningful resolution from being achieved. That debate should be postponed to another day, when appropriate facts are before the Court.

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C. The Board's Delays In Resolving The Issues In This Controversy And The Decision Finally Reached By The Board Both Demonstrate That Interim Bargaining And Reinstatement Were Inappropriate Here

A final brief word should be added here on two subjects.

First, the Board's actions in this case amply demonstrate that it did not deem the matters which were in controversy here to be of such urgency that it needed to complete its processes with dispatch.

The allegations against Pilot occurred, primarily, in February 1974. The Board waited until May 1974 to seek an injunction. The Board's Administrative Law Judge heard all the evidence in July and August 1974 and he made his decision in December 1974. The Board deliberated until March 26, 1976, at which time it substantially accepted the recommended decision of the Administrative Law Judge (Appendix B to this Brief). Had it been faced with such a consuming need to prevent its remedies from becoming impotent by the passage of time, it certainly could have speeded up the process itself. There was nothing so novel or unusual about the case that would justify its expenditure of over two years on these matters.

Secondly, the Board's Petition to this Court omits and mischaracterizes a number of important facts which substantially exculpate Pilot officials and representatives.

The Board has presented its statement of facts as if Pilot must be assumed by this Court to be guilty of a wide-

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ranging assortment of violations of the Labor Act. For this assumption, the Board directs this Court's attention to testimony *before the District Court* which Pilot was not allowed to refute by presenting rebuttal testimony from its witnesses.

Furthermore, and this is the essential point, when Pilot was allowed to present its witnesses before the Board's Administrative Law Judge, Pilot was vindicated in every instance. The Board's charges directed against Pilot officers and officials were dismissed by the Administrative Law Judge and the Board adopted his findings and conclusions (Appendix B to this Brief).

Therefore, it can be said that, in substantial respects, the Board's Petition has attempted to draw strength from factual allegations and assertions against Pilot which the Board itself has already found to be untrue and unsupported.

For instance, the Petition asserts that Roy Brace was one of the "Union's principal employee organizers" and he was "discharged" on February 7, 1974. The Board says that the District Judge committed error in not reinstating Roy Brace and that this Court should order Brace reinstated pending the outcome of the Board proceedings to determine whether this discharge was motivated by Brace's union activities (6, 20). What the Petition fails to point out is that the Board itself has already decided the discharge of Brace had nothing to do with union activities and the Company had no knowledge of any such activities on his part at the time (103a).

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Similarly, the Petition recites, as a fact that this Court should presume, that Pilot officials "threatened" its "truck-drivers" with "financial loss if they chose to have the Union represent them, and certain new benefits were announced at the meetings with the promise that additional favorable changes would be made when the union question was taken care of" (7). Here again, the Petition refers the Court *to testimony and findings before the District Court*, which Pilot was not given an opportunity to rebut with live witnesses. Even more importantly, the Petition fails to point out to this Court that when these allegations were tried out before the Administrative Law Judge, he absolved Pilot of wrongdoing as to these instances, and these findings have also been accepted by the Board (61a-91a).

The same observation is true as to the Petitioner's assertion that "Pilot Freight officials solicited individual groups of employees to return to work, promising them additional benefits if they did so" (8). When this allegation was tried on the merits, it was dismissed (85a-89a).

By this process of presenting only one side of the evidence to this Court — and presenting as fact assertions which the Board itself, after full hearing, has already rejected as untrue — the Petitioner has attempted to distort and magnify out of proportion the wrongdoing it accuses Pilot of here. An examination of the Board's decision on these matters, as reflected in the Administrative Law Judge's findings, shows that Pilot was substantially exonerated from the charges upon which the Board sought to have the injunction entered (61a-93a).

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Instead of a picture of massive and pervasive violations by Pilot officials, the true picture — which the Board must concede—is that not a single allegation it leveled against Pilot was proved. Its only tangible basis for making any claim against Pilot is on the theory that Pilot was a "joint employer" of the dockmen along with BBR and that accordingly Pilot must be made to suffer for a limited number of statements and actions by an official of BBR.

This factual background clearly shows the Petitioner to be grasping and overreaching in its presentation to the Court in order to obtain a grant of review which could not be hoped for upon an accurate factual understanding of this matter.

CONCLUSION

Upon all of the foregoing, Pilot Freight Carriers, Inc., earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectively submitted,

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
Attorneys for Pilot Freight Carriers, Inc.

APPENDIX A

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August 15, 1974
Winston-Salem, North Carolina

Memorandum of Agreement

Pilot Freight Carriers, Inc., hereinafter called "Company," and Teamsters Local 512, hereinafter called "512," agree as follows:

1. It is agreed that the question of recognition for dock workers at the Jacksonville, Florida terminal is to be resolved by the decision of the National Labor Relations Board in litigation pending at this time. It is further agreed by the Company and 512 that no effort will be made by either party hereto, to reopen the record in that pending litigation, or to use this agreement to influence the National Labor Relations Board or the Courts in their final determination of that pending litigation. It is further agreed that the final decision of the NLRB or the Courts in such litigation shall not nullify this agreement as to the drivers at the Jacksonville, Florida terminal.

2. It is agreed that the question of recognition for owner-operator drivers (local and road) is to be resolved by a card check of all owner-operator drivers of record as of February 14, 1974, at the Jacksonville, Florida terminal.

   It is further agreed that in the event Local 512 is successful in the card check provided for above, the following terms and conditions shall thereafter apply:

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a. All owner-operator drivers shall be permitted to continue under the terms of their current owner-operator contract with Pilot Freight Carriers, Inc. until March 31, 1976.

b. It is also agreed that the terms of the National Master Freight Agreement shall apply, as amended, by deleting Article 2, Section 3 (Non-Covered Units), Article 3, Section 1(a), paragraph 2 (Recognition), Article 22 (Owner-Operators), Article 23 (Separation of Employment), Article 33 (Cost of Living) and amend Article 39 (Duration) to become effective August 15, 1974.

c. *Road owner-operators:* The terms of the Southern Conference Road Supplemental Agreement shall apply, as amended, by deleting Article 42, Section 4 (Seniority), Article 48 (Lodging), Article 50 (Paid For Time General), Article 51 (Mileage and Hourly Rates), Article 52 (Guarantees), Article 53 (Subsequent Run), Article 54 (Sleeper Operation), Article 55 (Owner-Operators), Article 56 (Vacations), Article 57 (Holidays), Article 60 (Steel Haul Only), Article 61 (Perishable Commodities Only), Article 62 (Funeral Leave), and amend Article 58 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 59 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

Also, where there is an increase in the Company's freight tariff rates a like adjustment will be made

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in the mileage rates and/or other allowances provided under the owner-operator's contract referred to in sub-paragraph (a) above. (I.E. — a 5% increase in the freight tariff rate would result in a 5% increase in the mileage rate; thus, a 34¢ per mile rate would be increased by 1.7¢ per mile).

d. *Local Owner-Operators:* The terms of the Southern Conference Local Supplemental Agreement shall apply, as amended, by deleting Article 52 (Vacations), Article 53 (Holidays), Article 54 (Paid-For Time General), Article 55 (Wages and Hours), Article 56 (Leased Equipment), Article 57 (Funeral Leave), and amend Article 50 (Health and Welfare Benefits) to become effective September 1, 1974, and amend Article 51 (Pensions) to become effective March 1, 1976 and the amount shall be $22.00 per week.

Also, where there is an increase in the Company's freight tariff rate it will automatically reflect an increase in compensation under the owner-operators' contract referred to in sub-paragraph (a) above.

3. Any owner-operator driver who desires to cancel his lease agreement prior to March 31, 1976 may do so by giving the Company seventy-two (72) hours' written notice. At the time of giving such notice the owner-operator driver must also indicate if he desires to be placed on Company equipment.

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Where any owner-operator driver elects to cancel his lease and be placed on Company equipment, he shall work under all the terms of the National Master Freight Agreement, except that Article 2, Section 3 (Non-Covered Units) and Article 3, Section 1(a), paragraph 2 (Recognition) shall not apply. Such owner-operator driver shall also work under all the terms of the appropriate Southern Conference Supplemental Agreement (local or road), except Pension payments shall become effective March 1, 1976 and the amount shall be $22.00 per week.

4. This agreement shall become effective immediately upon ratification by the members of 512 and all picketing of Pilot Freight Carriers, Inc. by 512 shall cease immediately, and in no event later than 12:00 o'clock Noon on August 17, 1974.

For Pilot Freight Carriers, Inc.
PERCY J. LONG
Dir. of Labor Relations

For Teamsters Local Union 512
JAMES H. WHEELER
Secretary Treasurer

August 15, 1974

To: Pilot Freight Carriers, Inc.
This is to verify that the members of Teamsters Local Union 512, and employees of Pilot Freight Carriers, Inc.,

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ratified Memorandum of Agreement between Pilot and 512 dated August 15, 1974.

JAMES H. WHEELER
Secretary Treasurer
Business Manager

August 15, 1974

Memorandum of Agreement between Pilot Freight Carriers, Inc., and Teamsters Local Union 512, Jacksonville, Florida.

Pilot Freight Carriers, Inc., hereby recognizes Teamsters Local Union 512, Jacksonville, Florida, as the exclusive bargaining agent for all drivers (Local and Road) at the Jacksonville, Fla. terminal.

For Pilot Freight Carriers, Inc.,
PERCY J. LONG
Name
Dir. of Labor Relations
Title

For Teamsters Local Union 512
JAMES H. WHEELER
Name
Secretary Treasurer
Title

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APPENDIX B

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223 NLRB No. 41

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

PILOT FREIGHT CARRIERS, INC.
AND BBR OF FLORIDA, INC.

and

Cases 12—CA—6267 and
12—CA—6288

TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS
LOCAL UNION NO. 512, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA

PILOT FREIGHT CARRIERS, INC.

and

Case 12—CA—6384

TRUCK DRIVERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION NO. 512
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge Phil Saunders issued the attached Decision in this proceeding. Thereafter, the Respondents and the General Counsel

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filed exceptions and supporting briefs and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[1] only to the extent consistent herewith.

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[1]The General Counsel and the Charging Party have excepted, *inter alia* to the Administrative Law Judge's finding that Lane's statements that he had spent $10,000 in attorney's fees to counter the Union that otherwise would have gone to the employees was not unlawful. The Administrative Law Judge held that Lane had the rights to spend as much as he chose for an attorney and that whether or not any saving in that respect would have been passed on to the employees was speculative and solely in the control of management. We do not quarrel with the Administrative Law Judge's observation on the rights of employers to pay their attorneys, with his conclusion that it would be speculative to conjecture on who would benefit from any saving, nor even with his more questionable and ambiguous observation concerning the control of management over the disposition of any such saving—which is incorrect to the extent it might imply that an employer has a unilateral right to fix wages once the employees have selected a bargaining representative — but that is all beside the point. The point, and the vice of the statement, is the assertion that but for the Union the employees would have received $10,000 and the implication that further union activities would deprive the employees of pay they

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Although holding that a bargaining order was warranted under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969), the Administrative Law Judge found it unnecessary to decide whether or not the Respondents had violated Section 8(a)(5) of the Act, on the basis of *Steel-Fab, Inc.*, 212 NLRB 363 (1974), and dismissed the 8(a)(5) allegations. Since the Administrative Law Judge's Decision issued, the Board has reconsidered the policy enunciated in *Steel-Fab* and substantially modified it, concluding that finding violations of Section 8(a)(5) in *Gissel-type* refusal-to-bargain cases are not superfluous. *Trading Port, Inc.*, 219 NLRB No. 76 (1975).

Accordingly, and for the reasons fully set forth in the body of the Administrative Law Judge's Decision, we specifically adopt paragraph 6 of his Conclusions of Law and hold that the Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union on and after February 14, 1974, the date of the Union's demand for recognition. At that time the Union possessed a majority of authorization cards from employees in the unit

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might otherwise receive. It is always speculative whether or not any promise of benefit or threat of reprisal will be carried out. We conclude that the statements violated Sec. 8(a)(1) of the Act and shall amend the Order and notice accordingly.

We also find merit to exceptions to the omission of the unit description, the name of the Union, and certain standard provisions from the Order and notice.

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's rejection of the Respondents' defense that the Union discriminates against minorities.

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found appropriate and events rendering a free and fair election unlikely or impossible had already occurred. Under *Gissel, supra,* an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by cards, whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain.

Amended Remedy

Add the following to the third paragraph of the section of the Administrative Law Judge's Decision entitled "The Remedy."

"In addition, the Respondents shall make each of the unfair labor practice strikers whole for any loss of earnings suffered by reason of the Respondent's refusal, if any, to reinstate unfair labor practice strikers in the manner described above, by payment to him or her of a sum of money equal to that which he or she would have earned as wages during the period beginning 5 days after the date on which such employee applies for reinstatement and ending on the date which Respondents offer to reinstate such an employee. Backpay, where due, shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and shall include interest in the amount and manner set forth in *Isis Pumbing & Heating Co.,* 138 NLRB 716 (1962)."

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ORDER

Pursuant to Section 10(c) of the Natonal Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Pilot Freight Carriers, Inc. and BBR of Florida, Inc., Jacksonville, Florida, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating their employees about their union activities.

(b) Threatening employees with discharges because of their union activities.

(c) Announcing and enforcing a rule prohibiting solicitations for the Union.

(d) Discouraging membership in the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in regard to their hire and tenure of employment or any term or condition of employment.

(e) Threatening to withhold benefits because of the union organizing campaign.

(f) Refusing to recognize and bargain with Truck Drivers, Warehousemen and Helpers Union No. 512, affiliated with International Brotherhood of Teamsters, Chauf-

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feurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in a unit of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of or at Pilot's Jacksonville, Florida, terminal, including regular part-time employees, but excluding casual employees, coordinators, office clerical employees, guards, and supervisors as defined by the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate Melvynn Johnston to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(b) Reinstate upon their unconditional application to return to work the unfair labor practice strikers to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from any failure to reinstate them, as provided in "The Remedy."

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(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due under the terms of this Order.

(d) Upon request, recognize and bargain with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the above-described unit respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at their terminal in Jacksonville, Florida, copies of the attached notice marked "Appendix C."[2] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are

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[2]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent have taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D. C. March 25, 1976.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1000

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

The petition for a writ of certiorari, filed on January 14, 1976, presented the question whether Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), empowers a district court—upon finding reasonable cause to believe that the employer has committed unfair labor practices tending to de-

stroy the union's majority status and to preclude the holding of a fair election—to issue a bargaining order pending a final determination of the unfair labor practice charges by the Board, despite the absence of a preexisting bargaining relationship between the parties.

On March 25, 1976, the Board issued its decision and order in the case (223 NLRB No. 41; App., *infra*), upholding, with slight modification, the Administrative Law Judge's decision (Pet. App. E, pp. 46a-135a). The Board found that the companies had violated Sections 8(a)(1), (3) and (5) of the Act, and it ordered them, *inter alia*, to bargain with the union upon request (App. *infra*, pp. 3a-4a, 7a).

Since the Board has issued its final decision and order in this case, the question presented in the petition has become moot. As this Court explained in *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655, 658-659 (*per curiam*), in holding that a final decision by the Board had mooted a proceeding under the similar provisions of Section 10(*l*) of the Act, 29 U.S.C. 160(*l*):

> [B]y its terms § 10(*l*) merely authorizes the issuance of an injunction "pending the final adjudication *of the Board* with respect to [the] matter." [Court's emphasis.] Once the Board has acted, it can itself seek injunctive relief from the Court of Appeals, pursuant to § 10(e) of the Act, which empowers that court to grant "such temporary relief or restraining order as it deems just and proper." [Citation and footnote omitted.] The legislative history makes

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> clear that the purpose of enacting § 10(*l*) in 1947 was simply to supplement the pre-existing § 10(e) power of the Board by authorizing injunctive relief prior to Board action. [Footnote omitted.] It was thus relief prior to Board action that Congress was concerned with providing when it enacted § 10(*l*), and any injunction issued pursuant to that section terminates when the Board resolves the underlying dispute.

See also *Building & Construction Trades Council* v. *Samoff*, 414 U.S. 808; cf. *McLeod* v. *General Electric Co.*, 385 U.S. 533.

Although Section 10(j), unlike Section 10(*l*), does not, by its terms, limit the duration of injunctions issued thereunder to the period preceding "the final adjudication of the Board with respect to such matter" (see Pet. App. F, pp. 137a-138a), those sections were companion amendments to the Act and embody a similar legislative purpose. See Pet. 17-18, and *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419*, *supra*, 397 U.S. at 658-659, n. 5. Congress presumably intended injunctions issued under Section 10(j) to have the same limited duration as those issued under Section 10(*l*). The considerations relied on in *Sears* also indicate that a Board decision moots a case under Section 10(j).

Therefore, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the district court with directions to dismiss the Section 10(j) proceeding as moot. *United States* v. *Munsingwear*, 340 U.S. 36;

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Building & Construction Trades Council v. *Samoff*, *supra*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1976.

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APPENDIX

223 NLRB No. 41

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 12—CA—6267 and
12—CA—6288

PILOT FREIGHT CARRIERS, INC. AND
BBR OF FLORIDA, INC.

and

TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 512, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Case 12—CA—6384

PILOT FREIGHT CARRIERS, INC.

and

TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 512, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge Phil Saunders issued the attached Decision in this proceeding. Thereafter, the Respondents and the General Counsel filed exceptions and supporting

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briefs and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[1] only to the extent consistent herewith.

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[1] The General Counsel and the Charging Party have excepted, *inter alia* to the Administrative Law Judge's finding that Lane's statements that he had spent $10,000 in attorney fees to counter the Union that otherwise would have gone to the employees was not unlawful. The Administrative Law Judge held that Lane had the rights to spend as much as he chose for an attorney and that whether or not any saving in that respect would have been passed on to the employees was speculative and solely in the control of management. We do not quarrel with the Administrative Law Judge's observation on the rights of employers to pay their attorneys, with his conclusion that it would be speculative to conjecture on who would benefit from any saving, nor even with his more questionable and ambiguous observation concerning the control of management over the disposition of any such saving—which is incorrect to the extent it might imply that an employer has a unilateral right to fix wages once the employees have selected a bargaining representative—but that is all beside the point. The point, and the vice of the statement, is the assertion that but for the Union the employees would have received $10,000 and the implication that further union activities would deprive the employees of pay they might otherwise receive. It is always speculative whether or not any promise of benefit or threat of reprisal will be carried out. We conclude that the

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Although holding that a bargaining order was warranted under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Administrative Law Judge found it unnecessary to decide whether or not the Respondents had violated Section 8(a)(5) of the Act, on the basis of *Steel-Fab, Inc.*, 212 NLRB 363 (1974), and dismissed the 8(a)(5) allegations. Since the Administrative Law Judge's Decision issued, the Board has reconsidered the policy enunciated in *Steel-Fab* and substantially modified it, concluding that finding violations of Section 8(a)(5) in *Gissel-type* refusal-to-bargain cases are not superfluous. *Trading Port, Inc.*, 219 NLRB No. 76 (1975).

Accordingly, and for the reasons fully set forth in the body of the Administrative Law Judge's Decision, we specifically adopt paragraph 6 of his Conclusions of Law and hold that the Respondents violated Section 8(a)(5) of the Act by refusing to bargain with the Union on and after February 14, 1974, the date of the Union's demand for recognition. At that time the Union possessed a majority of authorization cards from employees in the unit found appropriate and events rendering a free and fair election unlikely or impossible had already oc-

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statements violated Sec. 8(a)(1) of the Act and shall amend the Order and notice accordingly.

We also find merit to exceptions to the omission of the unit description, the name of the Union, and certain standard provisions from the Order and notice.

In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's rejection of the Respondents' defense that the Union discriminates against minorities.

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curred. Under *Gissel, supra,* an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by cards, whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain.

Amended Remedy

Add the following to the third paragraph of the section of the Administrative Law Judge's Decision entitled "The Remedy."

"In addition, the Respondents shall make each of the unfair labor practice strikers whole for any loss of earnings suffered by reason of the Respondent's refusal, if any, to reinstate unfair labor practice strikers in the manner described above, by payment to him or her of a sum of money equal to that which he or she would have earned as wages during the period beginning 5 days after the date on which such employee applies for reinstatement and ending on the date which Respondents offer to reinstate such an employee. Backpay, where due, shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and shall include interest in the amount and manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962)."

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ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Pilot Freight Carriers, Inc. and BBR of Florida, Inc., Jacksonville, Florida, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating their employees about their union activities.

(b) Threatening employees with discharges because of their union activities.

(c) Announcing and enforcing a rule prohibiting solicitations for the Union.

(d) Discouraging membership in the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in regard to their hire and tenure of employment or any term or condition of employment.

(e) Threatening to withhold benefits because of the union organizing campaign.

(f) Refusing to recognize and bargain with Truck Drivers, Warehousemen and Helpers Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

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America, as the exclusive collective-bargaining representative of the employees in a unit of all city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Respondents, and working out of or at Pilot's Jacksonville, Florida, terminal, including regular part-time employees, but excluding casual employees, coordinators, office employees, guards, and supervisors as defined by the Act.

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate Melvynn Johnston to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(b) Reinstate upon their unconditional application to return to work the unfair labor practice strikers to their former positions or, if such positions no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings resulting from any failure to reinstate them, as provided in "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copy-

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ing, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of backpay due under the terms of this Order.

(d) Upon request, recognize and bargain with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the above-described unit respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Post at their terminal in Jacksonville, Florida, copies of the attached notice marked "Appendix C."[2] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respond-

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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ents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent have taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

PETER D. WALTHER, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

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APPENDIX C

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT question employees about their union activities.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT threaten to withhold benefits from our employees because of a union organizing campaign.

WE WILL NOT make, announce, or enforce any rule which prohibits only union solicitations.

WE WILL NOT discharge or otherwise discriminate in regard to the hire and tenure of employment or any term or conditions of employment of our employees because of their membership in and activities on behalf of the Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or of any other labor organization of their choice.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

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WE WILL offer to Melvynn Johnston his former job or, if such job no longer exists, a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will pay him for any loss of pay he may have suffered by reason or our discrimination against him together with interest thereon.

WE WILL reinstate the unfair labor practice strikers not already working to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, upon their unconditional applications to return to work and make them whole for any loss of earnings resulting from our failure to reinstate them within 5 days from their unconditional requests.

WE WILL bargain collectively with Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, respecting rates of pay, wages, hours, or other terms and conditions of employment, as the representative of our employee in the bargaining unit set forth herein, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All city pickup and delivery truckdrivers, over-the-road truckdrivers, and dockworkers employed by and/or jointly employed by Pilot Freight Carriers, Inc., and BBR of Florida, Inc., and working out of or at Pilot Freight Carriers' Jacksonville, Florida, terminal, including regu-

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lar part-time employees, but excluding casual employees, guards, and supervisors as defined in the Act.

PILOT FREIGHT CARRIERS, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

BBR OF FLORIDA, INC.
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813—228-2662.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 205073 239

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Supreme Court, U. S.
FILED
MAY 24 1976

No. 75-1000

In the

Supreme Court of the United States

October Term, 1975

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PILOT FREIGHT CARRIERS, INC., ET AL.,
Respondents

RESPONSE OF TEAMSTERS LOCAL 512 TO SUPPLEMENTAL MEMORANDUM OF PETITIONER

Respectfully submitted,

DAVID PREVIANT
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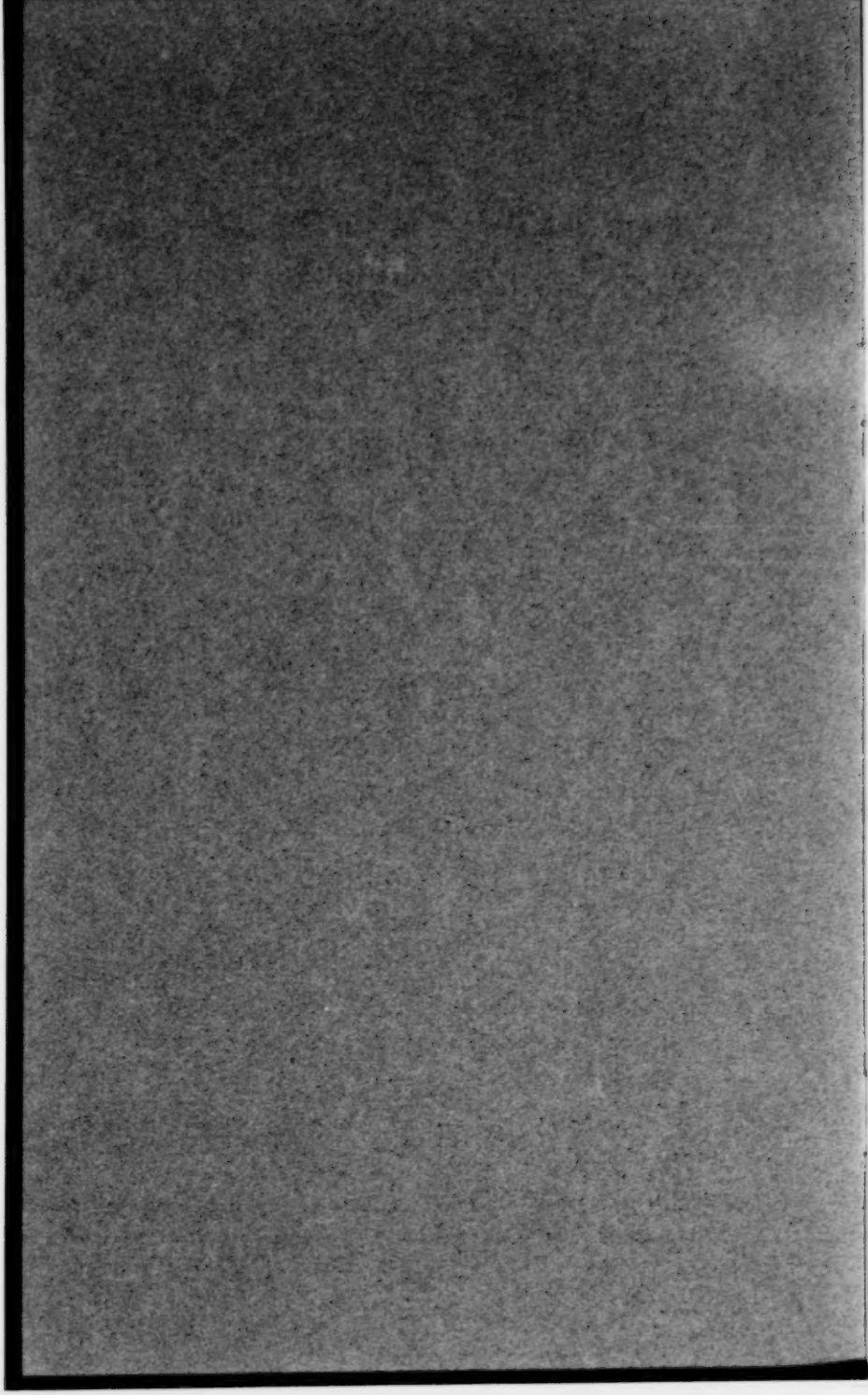

In the

Supreme Court of the United States

October Term, 1975

No. 75-1000

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PILOT FREIGHT CARRIERS, INC., ET AL.,
Respondents

RESPONSE OF TEAMSTERS LOCAL 512 TO SUPPLEMENTAL MEMORANDUM OF PETITIONER

Pursuant to the Court's letter of May 3, 1976, inviting response to the Government's Memorandum of April 17, 1976, we advise the Court:

The petition poses the question as to a district court's power under § 10(j) of the Act to require by interim order that an employer bargain with a union, where that court has found a showing of union majority and reasonable cause to believe that the employer has committed a number of serious unfair labor practices so as to preclude the holding of a fair election.

We oppose Petitioner's suggestion that the question has become moot.

The petitioner suggests mootness solely by reason of the issuance of an Order by NLRB on March 25, 1976,

requiring the respondent employer to bargain, reinstate an employee, and cease and desist from its law violations.

The employer continues to refuse to comply. As recently as May 10, 1976, the employer has again refused to bargain. Specifically, the employer advised:

> As you know, we have always maintained that we have no dock employees at Jacksonville, Florida. Furthermore, we have an agreement with your union that the dispute will be resolved by a final order of the National Labor Relations Board. The current order of the Board is not final and will not be final until it has been reviewed by the U.S. Court of Appeals of the 5th Circuit.[1]

1.

So it is clear that the case is not factually moot. Indeed, the employer who since 1971,[2] has been avoiding the responsibility to bargain, is continuing to refuse to bargain, despite his reiterated acknowledgment of his prior agreement to comply with the NLRB's final Order.

The Board's March 25, 1976 Order is final.[3] But Pilot will not acknowledge that fact, and refuses to comply with

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[1] Pilot's letter of May 10, 1976, from which we have quoted a portion is appended hereto, at p. A-1, *infra*.

[2] See *Pilot Freight Carriers, Inc.*, 208 NLRB 853 at 858; *Boire* v. *Intl. Brhd. of Teamsters*, 479 F.2d 778 (5th Cir. 1973); *Pilot Freight Carriers* v. *Local 560*, 373 F.Supp. 19 (D.C. N.J., 1974) and companion cases listed at 373 F.Supp. 27-28. See also *Local 391* v. *Pilot Frt. Carriers*, 497 F.2d 311 (4th Cir. 1974), cert. den. ..... U.S. .....

[3] Act, § 10(g) provides:

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

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the statute, or the Order.

Pilot's assertion that its dock workers are "independent contractors" and not "employees," has been thrice denied. In *Pilot Freight Carriers, Inc.*, 208 NLRB 853 (1974)[4] the Board found them to be employees. Again, in 1975, Administrative Law Judge Saunders found them to be "employees,"[5] and that ruling was affirmed in the Board's Order of March 25, 1976.[6] Yet Pilot continues to maintain: ". . . we have no dock employees . . ." and thus to refuse to bargain.

Section 10(j) of the Act was enacted to prevent just such charade. For five years from 1971-1976 Pilot has utilized the procedures of the Act to evade it. Findings of the district court, and multiple determinations before NLRB, that these workers are "employees," entitled to the protection of the Act, do not become "moot" merely upon the issuance of another "order" which Pilot advertises it will flout!

2.

Section 10(j) of the Act was adopted to preclude the very scheme which Pilot here follows. Experience had shown, by 1947, when the Taft-Hartley amendments (including § 10(j)) were added that the procedures of the Board were frequently too slow to achieve the statutory objective of "prompt elimination of the obstructions to the free flow

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[4] This determination was made upon a sixty-volume record, recording hearings which were held in Tampa from May 1972 until March 1973, in which the employee status was meticulously demonstrated. See NLRB Case 12-UC-21, et al, 208 NLRB 853 at 856.

[5] See Appendix to Petition at p. 50a-60a.

[6] 223 NLRB #41, reprinted as Appendix to Petitioner's Supplemental Memorandum, at pp. 1a-8a.

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of commerce and encouragement of the practice and procedure of free and private collective bargaining." The Congress understood that the Board was ineffective in correcting unfair labor practices where "persons violating the Act . . . accomplish their illegal objective before being placed under any legal restraint . . ."[7]

Accordingly, § 10(j) was added, providing for "appropriate temporary relief."[8]

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[7] S.Rep. No. 105, 80th Cong., 1st Sess., p. 27 (1947):

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

[8] § 10(j) in its entirety provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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Significantly, § 10(j) did not limit the time during which the injunctive relief would be operative. The duration of the injunction is left, insofar as the literal terms of the Act specify, to the discretion of the issuing court.

3.

The Taft-Hartley 1947 amendments also added proscriptions against specified acts of secondary union activity, i.e., as defined in the new §§ 8(b)(4); 8(e) and 8(b)(7); and provided in § 10(l) for temporary injunction against such activities "pending the final adjudication of the Board with respect to the matter."[9]

4.

The suggestion of mootness here is based upon the assertion (memo, p. 3) that "Congress presumably intended injunctions issued under § 10(j) to have the same limited duration as those issued under § 10(l)." We believe that

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[9] § 10(l) in pertinent part provides:

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

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presumption to be unwarranted.

(a)

In the first place, the literal language of the statute is significantly different. The traditional unfair labor practice—that which has been unlawful for the forty years since the Wagner Act became law—had not been adequately controlled. So injunctive relief was to be available promptly to achieve the statutory objective of "the encouragement of the practice and procedure of free and private collective bargaining." The injunction, as specified in § 10(j), was to provide "appropriate temporary relief." Its duration was left to the issuing tribunal.

But more precise language was used in § 10(l) providing for injunctive relief from the newly defined [10] unlawful boycott activities. While these in their secondary aspects were made unlawful, it must have been recognized, as the Courts have frequently since noted,[11] that broad proscription of secondary activity often infringes upon lawful, indeed, protected primary activities. Accordingly, if injunction of unlimited duration barring secondary activities could interfere with protected primary rights, its duration should not extend beyond "the final adjudication of the Board with respect to the matter."

Thus viewed, the difference in the literal terms of §§ 10(j) and 10(l) becomes significant. For even granting that these

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[10] §§ 8(b)(4); 8(e) and 8(b)(7) were all added at the time 10(j) and (1) were added, as part of the 1947 Taft-Hartley Amendment.

[11] *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665; *Electrical Workers Local 761* v. *NLRB*, 366 U.S. 667; *Carrier Corp.* v. *NLRB*, 376 U.S. 492.

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sections "were companion amendments to the Act and embody a similar legislative purpose" (memo, p. 3), i.e. that there was a common purpose in providing a form of injunctive relief—the duration where protecting against traditional unfair practices which hit at the heart of the statute was not limited. But the bar on newly proscribed and imprecisely defined practices was to be of more limited duration, since the ban might chill the exercise of protected rights.

(b)

Neither *Sears Roebuck*,[12] nor *Samoff*,[13] cited by the Government, deal with § 10(j). In *Sears*,[14] the parties' concessions; the language of section 10(l); and the policies requiring a post-decision examination of the propriety of continued temporary relief in the narrow area where injunction against "secondary" activity may unduly infringe legitimate § 7 (and even constitutional) "primary" rights; may all combine to support the view that the § 10(l) injunction is of limited duration.[15]

But in the case at bar, the language of the statute, and the policies of effective elimination of traditional illegal labor practices point to a different result—i.e., injunctive relief against employers who utilize NLRB delays to deny the very rights which the Act purports to guarantee.

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[12] *Sears Roebuck* v. *Carpet Layers, etc.*, 397 U.S. 655.

[13] *Building, etc. Trades, etc.* v. *Samoff*, 414 U.S. 808.

[14] Similarly, *Samoff* dealing only with § 10(1), is not determinative as to § 10(j).

[15] With, of course, the Board's access to the Circuit Court "for appropriate temporary relief or restraining order" from the appellate court, if the facts then warrant. See 29 U.S.C. § 160(e).

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Finally, *McLeod* v. *General Electric*, 385 U.S. 533, does not point to a mootness determination here. While *McLeod* involved § 10(j)—it held only that where, during the pendency of a claim of failure to bargain, the parties had entered into a new collective agreement, the question of mootness should be determined in the first instance by the district court, and the case was remanded for that purpose.

Here Pilot makes no claim of mootness by reason of an intervening collective agreement. To the contrary, Pilot says: We have no employees—we will not bargain.

To reassert the very refusal which has continued the controversy for five years is not to moot it!

WHEREFORE, we respectfully urge that the case is not moot, certiorari should be granted, and the issue presented in the petition for certiorari should be decided by this Court.

Respectfully submitted,

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(214) 630-3672

FLEET THROUGH

APPENDIX

Reply to: Post Office Box 6764
Jacksonville, Florida 32205

May 10, 1976

CERTIFIED MAIL, Return Receipt
Requested No. 852626

Mr. James H. Wheeler
Secretary-Treasurer
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America
Local 512
10478 Atlantic Boulevard
Jacksonville, Florida 32211

Dear Mr. Wheeler:

As you know, we have always maintained that we have no dock employees at Jacksonville, Florida. Furthermore, we have an agreement with your union that the dispute will be resolved by a final order of the National Labor Relations Board. The current order of the Board is not final and will not be final until it has been reviewed by the U.S. Court of Appeals of the 5th Circuit.

The matter is now being prepared for presentation to that court. We trust you will abide by the agreement and not get your union and our company involved in another unnecessary economic war.

Yours very truly,

PILOT FREIGHT CARRIERS, INC.
/s/ H. Z. Miller
Regional Manager

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1000

HAROLD A. BOIRE, REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FURTHER SUPPLEMENTAL MEMORANDUM FOR THE REGIONAL DIRECTOR OF THE TWELFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

In our supplemental memorandum, we pointed out that the duration of an injunction issued under Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), is limited to the period preceding issuance by the Board of its final decision on the underlying unfair labor practice charges. Since the Board issued, on March 25, 1976, its final decision and order in this case, we noted that the question presented in the petition has become moot.

In response to this Court's request for the views of "adverse parties" to the government's supplemental memorandum, Teamsters Local 512—not a party to this litigation—has suggested that the case is not moot

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because at least one of the employers involved here, Pilot Freight Carriers, Inc., has refused to comply with the Board's order. But an employer's failure to comply with an order of the Board does not extend the period during which an injunction issued under Section 10(j) is effective. Indeed, the legislative history and policies relied upon by this Court in *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419,* 397 U.S. 655, confirm that Section 10(j) of the Act—like Section 10(*l*)—was intended to supplement other remedies provided in the Act and that the relief available under Section 10(j) terminates when the Board has finally adjudicated the unfair labor practice question. If an employer refuses to comply with and order of the Board, such as that issued on March 25, 1976, the Board may petition under Section 10(e) of the Act, 29 U.S.C. 160(e), for enforcement of its order[1] and for any "temporary relief or restraining order" that it deems appropriate.

In support of the contention that Congress did not intend to limit the duration of injunctions issued under Section 10(j), Teamsters Local 512 asserts that the purpose of such injunctions was to protect "against traditional unfair practices which hit at the heart of the statute * * *" (Response, p. 7). In contrast, according to Teamsters Local 512, Congress felt it necessary to limit the duration of injunctions issued under Section 10(*l*) because of the danger that such injunctions "might chill the exercise of protected rights" (*ibid.*). But even assuming that the suggested policy distinction could have led Congress to provide for injunctions of different duration under Sections 10(j) and 10(*l*), the legislative

---

[1]Indeed, on May 21, 1976, the Board filed such an enforcement petition. *National Labor Relations Board* v. *Pilot Freight Carriers, Inc.*, No. 76-2425 (C.A. 5).

history of those companion amendments to the Act does not contain any evidence that Congress did so or that it viewed differently the purposes of those amendments.

Respectfully submitted.

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